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No. 84-1288

In The

Supreme Court of the United States

October Term, 1984

JOHN V. EVANS, ROSE BOWMAN, GEORGE BACHIK and WILLIAM GRUZINSKI,

Petitioners,

v.

JEFF D., PAULA E., JOHN M. and DUSTY R., Minors, By and Through Their Next Friend, CHARLES JOHNSON, III, Individually and on Behalf of the Class They Represent and MARK CLARY, Intervenor,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Petition for Certiorari Filed February 12, 1985
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RELEVANT DOCKET ENTRIES:

1. United States District Court (Idaho)

Date	*Proceedings*
8/ 4/80	Order granting leave to proceed in forma pauperis.
8/ 4/80	Complaint.
8/ 4/80	Order appointing Charles Johnson as next friend of plaintiff.
9/29/80	Answer.
2/ 2/81	Order granting motion to intervene (Mark Clary and Frank Clary).
10/19/81	Stipulation in settlement of claims against education defendants and for provision of education services. Order.
3/ 8/82	Notice of substitution of Charles Johnson, III and Howard A. Belodoff as counsel for plaintiff.
3/25/82	Motion for summary judgment by plaintiff.
5/ 3/82	Motion of defendants Klein, Bachik, and Elmore for summary judgment.
7/26/82	Memorandum Decision.
7/26/82	Order granting defendant's motion for summary judgment as to duty of providing additional facilities and denied regarding federal constitution and Idaho Code.
9/ 7/82	Stipulation for class certification. Order.
11/ 1/82	Amended answer.
3/22/83	Record of hearing. Proposed Stipulation Settling Mental Health Claims submitted by parties and taken under advisement. Trial vacated.
4/ 4/83	Motion of plaintiff for consideration of costs and attorney's fees on settlement.

4/28/83 Record of hearing. Motion for attorney's fees denied. Court signed Order accepting Stipulation Settling Mental Health Claims.

5/ 9/83 Order denying all costs.

5/26/83 Notice of appeal by plaintiffs.

6/ 3/83 Motion of defendants to suspend performance of Stipulation Settling Mental Health Claims pending appeal.

8/12/83 Order suspending Stipulation while on appeal.

8/29/83 Motion of plaintiffs for relief from stay order.

9/ 6/83 Order denying motion for relief from stay.

10/22/84 District Court's Order tolling defendants' obligation to respond to new and pending matters.

2. Ninth Circuit Court of Appeals.

9/19/83 Filed, Appellant's emergency motion for stay or injunction pending appeal.

9/26/83 Filed Order. Appellant's emergency motion for stay or injunction pending appeal is granted. The district court's order suspending the parties' Stipulation pending appeal is vacated. Pending the disposition of this appeal, the parties shall comply with their Stipulation.

3/18/84 Case argued and submitted to Judges Schroeder, Farris and Reinhardt.

9/20/84 Ordered, Opinion filed and judgment to be entered.

10/ 4/84 Filed, Appellee's petition for rehearing and suggestion of rehearing en banc.

10/ 5/84 Filed, Appellant's request for award of attorney's fees on appeal.

10/26/84	Filed, Appellant's second emergency motion for stay or injunction pending appeal.
11/ 6/84	Filed Order. The appellant's second emergency motion for stay of injunction pending appeal is granted. The district court's order of 10/22/84, is vacated. The parties shall comply with their Stipulation Settling Mental Health Claims.
11/19/84	Received, Appellee's second petition for rehearing and suggestion for rehearing en banc.
11/21/84	Filed Order. The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.
11/28/84	Filed, Appellee's motion for stay of mandate.
11/29/84	Mandate issued.
12/ 6/84	Filed Order. The mandate in this case has issued. The motion for stay and the second petition for rehearing and suggestion for rehearing en banc are both denied as moot.
12/11/84	Filed, Appellee's motion to recall mandate and renew motion to stay pending application for writ of certiorari.
1/14/85	Filed Order. The court has considered the appellee's motion to recall the mandate to stay its issuance pending application for writ of certiorari. It is ordered that the mandate be recalled and its issuance stayed, provided that the parties comply with their Stipulation.
2/21/85	Received from the United States Supreme Court, notice of filing of petition for writ of certiorari.
4/18/85	Filed Order. Appellant's motion for reasonable attorney's fees on appeal in the amount of $4,896.06 is granted.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

CIV. NO. 80-4091

JEFF D., PAULA E., JOHN M., and DUSTY R., minors, individually and on behalf of the class they represent, by and through their next friend, Charles Johnson,

Plaintiffs,

v.

JOHN V. EVANS, individually and in his official capacity as Governor of the State of Idaho;

MILTON G. KLEIN, individually and in his official capacity as Director of the Idaho State Department of Health and Welfare;

JERRY EVANS, individually and in his official capacity as State Superintendent of Public Instruction of the Idaho State Department of Education;

GEORGE BACHIK and CARROLL ELMORE, individually and in their official capacities as Directors of State Hospital South;

Their Successors to Office, Title and Interest,

Defendants.

CLASS ACTION COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

(Filed August 4, 1980)

I. PRELIMINARY STATEMENT

1. This is a class action for Declaratory and Injunctive Relief on behalf of the named Plaintiffs and the class they represent consisting of all Idaho children under the age of twenty-one who now, or will in the future, suffer from emotional or mental handicaps and who are, or will

in the future, be institutionalized or otherwise placed in residential programs by Defendants. Plaintiffs and the class they represent seek relief from the Defendants' failure to provide adequate or appropriate treatment and educational programs in the least restrictive alternative setting in violation of the Plaintiffs' rights under the Fifth and Fourteenth Amendments to the United States Constitution; Article I, Sections One, Thirteen and Eighteen, and Article X, Section One of the Constitution of the State of Idaho; the Community Mental Health Centers Act (42 U.S.C. § 2661); the Rehabilitation Act of 1973 (29 U.S.C. § 794); the Education for all Handicapped Children Act (20 U.S.C. § 1401); the Developmental Disability Assistance and Bill of Rights Act (42 U.S.C. § 6000); the Idaho State Education of the Handicapped and Others Unable to Attend School Statute (Idaho Code § 33-2001); the Idaho Youth Rehabilitation Act requiring detention facilities to segregate juveniles from those treated as adult offenders (Idaho Code § 16-1812(A) (1), with respect to those in the Plaintiff class who are housed at State Hospital South with those treated as adult offenders under Idaho Code §§ 18-200 et seq.).

2. Because of the acts, omissions and policies of the Defendants, and the combined effect of their failure to cooperate with each other, the Plaintiffs and the class they represent are denied those services necessary to insure Plaintiffs and the members of their class a reasonable chance for rehabilitation and integration into society as a whole. Due to the failure of the Defendants to provide appropriate mental health and educational services, many of these Plaintiffs are confined on adult psy-

chiatric wards or are confined to facilities in other states (including Texas) to the detriment of both themselves and society as a whole. These children and adolescents do not have available to them the continuum of appropriate mental health and educational services, including residential placements, which Defendants must provide pursuant to law. The named Plaintiffs and the class they seek to represent ask only that this Court order the Defendants to provide such minimally adequate mental health and educational services as to give Plaintiff Class a reasonable hope for rehabilitation in the least restrictive alternative setting.

II. JURISDICTION AND RELATED MATTERS

3. Jurisdiction is conferred on this Court by 28 U.S.C. § 1343(3) and (4) for actions arising under 42 U.S.C. § 1983. Jurisdiction is conferred on this Court to hear the claims under the Education for all Handicapped Childrens Act (20 U.S.C. § 1401) by 20 U.S.C. § 1415(e) (3). Plaintiffs' action for declaratory relief is authorized by 28 U.S.C. §§ 2201 and 2202 and Rule 57 of the Federal Rules of Civil Procedure. Plaintiffs' action for injunctive relief is authorized by Rule 65 of the Federal Rules of Civil Procedure. Plaintiffs' claims under the Idaho Constitution and Statutes set out hereinafter are all state law claims which may properly be considered under this Court's exercise of pendent jurisdiction.

III. PLAINTIFFS

4. Plaintiff, Jeff D., is a seventeen-year-old resident and citizen of Bingham County, Idaho. He is currently being held against his will as an involuntary civil

patient at State Hospital South in Blackfoot, Bingham County, State of Idaho, a facility of the Idaho State Department of Health and Welfare.

5. Plaintiff, Paula E., is a seventeen-year old resident and citizen of Bingham County, Idaho. She is presently being held against her will as an involuntary patient at State Hospital South in Blackfoot, Bingham County, State of Idaho, a facility of the Idaho State Department of Health and Welfare.

6. Plaintiff, John M., is a fourteen-year-old resident and citizen of Idaho. He is currently being held against his will at the Devereaux Foundation, Texas Branch, in Victoria, Texas, a psychiatric facility on contract to the Idaho State Department of Health and Welfare.

7. Plaintiff, Dusty R., is a twelve-year-old resident and citizen of Ada County, Idaho. He was being held against his will at State Hospital South in Blackfoot, Bingham County, State of Idaho, until transferred to the Idaho Youth Ranch, and then to a group home in Boise, Idaho.

8. Charles Johnson is a citizen of Idaho and a resident of Bonneville County, Idaho. He sues on behalf of the above named children as next friend. Minor Plaintiffs omit their full names in order to protect their identities. It is Plaintiffs' belief that the use of their full names will subject them to public humiliation and embarrassment.

Defendants

9. Defendant, John V. Evans, is a citizen of the State of Idaho. He is the Governor of the State of Idaho and the ex officio Director of the Budget for the State. As Director of the Budget, Evans has extensive authority for

reviewing the budget requests of State agencies, determination of the budgetary needs of each State agency and for submission to the Idaho State Legislature of a proposed budget for all State agencies.

10. Defendant, Milton G. Klein, is the Director of the Idaho State Department of Health and Welfare. He has statutory responsibility for the administration of the Department of Health and Welfare and its Divisions. He has ultimate responsibility for the administration of the State's treatment and educational programs for children in the state who are committed to institutions on account of mental disabilities or delinquency. He is further empowered to issue such regulations and policies as are necessary to carry out the above statutory responsibilities.

11. Defendant, Jerry Evans, is the State Superintendent of Education in Idaho. In this capacity he is responsible for carrying out the educational programs developed and adopted by the Idaho State Department of Education. He is also responsible for planning, developing and monitoring the educational program in Idaho for the institutionalized children in Idaho, which includes the Plaintiffs and the class they represent.

12. Defendants, George Bachik and Carroll Elmore, M.D., are, respectively, the Administrative and Clinical Directors of State Hospital South in Blackfoot, Bingham County, State of Idaho, a facility of the Idaho State Department of Health and Welfare. In this capacity they are responsible for the custody, care and treatment of part of the Plaintiff class.

13. The Defendants are sued in their official capacities and at all times material to this action, they have

acted under color of state law, custom and usage of the State of the State of Idaho. The successors to office, title and interest to Defendants are also named as Defendants to this lawsuit.

IV. CLASS ACTION

14. Plaintiffs bring this action pursuant to Rule 23(b)(1) and Rule 23(b)(2) of the Federal Rules of Civil Procedure, on their own behalf and on behalf of all other Idaho youth under the age of twenty-one who are, or will be in the future, be involuntarily institutionalized or placed in residential programs; and for whom the Defendants have not provided appropriate treatment and educational programs in the least restrictive alternative setting. The class is composed of the following subclasses:

a. Those residing at State Hospital South in Blackfoot, Bingham County, State of Idaho.

b. Those residing inside or outside the State of Idaho, in facilities or institutions under contract to the Idaho State Department of Health and Welfare.

15. Upon information and belief, there are over 50 (fifty) handicapped children who come within the definition of the class. The members of the class are so numerous that joinder of all members is impractical. The predominant questions of law and fact are common to all members of the class, including the alleged policies and practices challenged in this action which Defendants apply consistently to similarly situated members of the class. The claims of the named Plaintiffs are typical of the claims of the class and the Plaintiffs will fairly and adequately protect the interests of the entire class. The declaratory and injunctive relief sought by the named

Plaintiffs is typical of the relief sought by all members of the class.

16. The prosecution of separate actions by or against individual members would create a risk of:

a. inconsistent or varying adjudications with respect to members of the individual class members which would establish incompatible standards of conduct for the party opposing the class; or

b. adjudications with respect to individual class members which would, as a practical matter, be dispositive of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.

The Defendants have acted or refused to act on grounds generally applicable to the class, thereby making appropriate final declaratory and injunctive relief with respect to the class as a whole.

V. STATEMENT OF FACTS

Plaintiff Jeff D.

17. Plaintiff, Jeff D., is a seventeen-year-old boy who has been diagnosed as being emotionally disturbed with unsocialized aggression and mild mental retardation. At the age of fifteen years Plaintiff Jeff D. was removed from his normal school setting and placed at State Hospital South where he has remained to this day.

18. Jeff D. lived in many foster homes. Numerous attempts were made by Jeff D.'s counselors and social workers to locate an appropriate program for Jeff D., but

none was found to be suitable because of Jeff D.'s handicaps. Thereafter, Jeff D. was committed against his will to the custody of the Idaho State Department of Health and Welfare.

19. Upon information and belief, since the date of his commitment to the Idaho State Department of Health and Welfare, Jeff D. has suffered injury to his mental and physical well-being. Upon information and belief, Jeff D. is not receiving appropriate treatment nor participating in educational programs which are designed to meet his particular needs.

20. On information and belief, Jeff D. suffers from a treatable condition which could be improved through appropriate treatment and education. On information and belief, Jeff D. could live in a less restrictive environment if appropriate treatment and educational programs were available to him. On information and belief, no such programs are made available to Jeff D. by the Defendants or any other source presently in the State of Idaho.

21. On information and belief, the Defendants have, or should have had, long-standing knowledge of the conditions and needs of the Plaintiff. However, the Defendants, both jointly and separately, have under color of State law failed to provide appropriate treatment and educational programs for the Plaintiff in the least restrictive alternative setting.

Plaintiff Paula E.

22. Plaintiff, Paula E., is a seventeen-year-old girl who has been diagnosed as suffering from a borderline

personality disorder and mild mental retardation. At the age of fifteen years she was removed from her normal school setting and placed in State Hospital South, where she remains to this day.

23. Paula E. has been placed in several different institutions both inside and outside the State of Idaho. She presently resides at State Hospital South in Blackfoot, Bingham County, Idaho, solely because there is no other appropriate facility for her placement.

24. Upon information and belief, Paula E. is not receiving appropriate treatment nor participating in appropriate educational programs which are designed to meet her particular needs. Since the date of her commitment to the Idaho State Department of Health and Welfare, Paula E. has suffered injury to her physical and mental well being.

25. On information and belief, Paula E. suffers from a treatable condition which could be improved through appropriate treatment and education. On information and belief, Paula E. could live in a less restrictive environment if appropriate treatment and educational programs were available to her. On information and belief, no such programs are made available to Paula E. by the Defendants, or any other source presently within the State of Idaho.

26. On information and belief, the Defendants have, or should have had, long standing knowledge of the conditions and needs of the Plaintiff. However, the Defendants, both jointly and seperately, have under color of State law refused and continue to refuse to provide ap-

propriate treatment and educational programs for Plaintiff in the least restrictive alternative setting.

Plaintiff John M.

27. Plaintiff, John M., is a fifteen-year-old boy who had been diagnosed as a child with emotional problems, possible mild mental retardation, and other handicaps. Plaintiff John M. has experienced problems caused by anti-social behavior for the past several years, having been placed in special education classes and community residential programs which were not appropriate to his needs.

28. In January, 1980, Plaintiff, John M., was transferred from State Hospital South in Blackfoot, Bingham County, State of Idaho, to the Devereaux School, Texas Branch, in Victoria, Texas. On information and belief, the programs provided to Plaintiff, John M., since his commitment to the Devereaux School, have been more appropriate to meet his particular needs than any treatment available in Idaho. However, the geographical isolation of Victoria, Texas, has caused John M. to suffer a loss of contact with family, friends and others in Idaho.

29. On information and belief, John M.'s emotional problems are treatable and could be improved. On information and belief, John M. could live in a less restrictive environment if appropriate treatment and educational programs were available to him. The Defendants have or should have had long-standing knowledge of the serious emotional handicaps and the needs of Plaintiff, John M., but Defendants have refused under color of state law to provide appropriate treatment and educational pro-

grams. On information and belief, the geographical isolation of Plaintiff, John M., in Texas, has caused and will cause emotional problems frustrate his emotional development, and is not in his best interest.

Plaintiff Dusty R.

30. Plaintiff, Dusty R., is a twelve-year-old boy who has been diagnosed as having an emotional disorder, adjustment reaction of childhood with anti-social traits, and other handicaps. These have been accompanied by behavior toward other persons which is characterized as aggressive and resulted in the placement of Plaintiff, Dusty R., in a number of residential programs during the past several years.

31. Plaintiff Dusty R. was admitted to State Hospital South in Blackfoot, Bingham County, State of Idaho, in May, 1980. All placements, both inside and outside Idaho that were available to Defendants, had refused to admit Dusty R. to their programs due to over-crowding and Dusty R.'s handicaps. Finally, Plaintiff, Dusty R., was transferred to an inappropriate placement at the Idaho Youth Ranch. The placement at the Idaho Youth Ranch proved unsuccessful so he currently resides in an inappropriate placement at a group home in Boise, Idaho. The Idaho Youth Ranch and the group home in Boise, Idaho, are facilities for the custody, care and treatment of youth, independent of, but on contract to, the Idaho State Department of Health and Welfare.

32. On information and belief, no appropriate treatment and educational programs are being provided for Dusty R. at this time. Dusty R.'s emotional and physical handicaps are treatable and could be improved to allow him to reside in less restrictive environments if appropriate treatment and educational programs were available to him. Defendants have, or should have, known that Plaintiff, Dusty R., is in immediate need of appropriate treatment and educational programs and the Defendants have failed under color of State law to provide such programs.

Plaintiff Class

33. On information and belief, there are over fifty (50) children under the age of twenty-one (21) in Idaho who suffer from emotional, mental or neurological handicaps and are placed in institutional or residential settings.

34. On information and belief, these children are, or will be, confined against their will by Defendants under color of State law.

35. On information and belief, these children are not, or will not in the future, receive the special treatment and educational programs which are appropriate to their needs in the least restrictive alternative setting.

36. On information and belief, these children suffer from treatable conditions which could be improved by appropriate treatment and education.

37. On information and belief, the Defendants have, or should have had, long standing knowledge of the conditions and needs of these children. However, the Defendants have under color of State law, both jointly and

separately, failed to provide appropriate treatment and educational programs for these children in the least restrictive alternative setting.

38. On information and belief, some of these children will be placed in institutions or facilities outside the state of Idaho in which treatment and education more appropriate to the individual child's needs will be provided than is available anyplace in Idaho. However, these institutions are located far from Idaho (e.g., Texas), and hence restrict the contact of the child with his family, friends and others in Idaho.

39. On information and belief, some of these children are, or will be, placed in facilities in Idaho under contract to the Idaho State Department of Health and Welfare. On information and belief, these facilities provide more adequate treatment and education for the individual child than that available at State Hospital South, yet still do not provide appropriate treatment and education to these children in the least restrictive alternative setting.

40. On information and belief, some of these children will be placed in State Hospital South in Blackfoot, Bingham County in the State of Idaho. On information and belief, in State Hospital South these children will not receive appropriate treatment and education in the least restrictive alternative setting. On information and belief, the children placed in State Hospital South will come into contact with those treated as criminal offenders (e.g., those who are being evaluated, unfit to stand trial or have been acquitted of a crime on the grounds of mental illness under Idaho Code sections 18-211, 18-212, or 18-214, respectively.).

41. There is no reason in logic or law for the treatment and placement of the children alleged in the preceding three paragraphs. This classification of these children is arbitrary, capricious and irrational.

42. These children are, and will continue to be, confined to institutions which fail to provide appropriate treatment and education programs in the least restrictive setting which will cause these children to suffer irreparable physical and emotional harm with no presently adequate remedy at law.

VI. FIRST CAUSE OF ACTION:

EQUAL PROTECTION

43. The Fifth and Fourteenth Amendments to the United States Constitution and the Constitution of the State of Idaho in Article I, section eighteen provide that no person shall be denied equal protection of the laws.

44. The acts, practices and policies of the state Defendants have created three groups of children and adolescents. The first group of children and adolescents are those that receive all special treatment and educational services necessary; the second group is comprised of those children and adolescents who are receiving mental health and educational services but not in the least restrictive environment appropriate to their needs; the third group is comprised of those children and adolescents who are [not] receiving appropriate mental health and educational services in the environment that is [not] the least restrictive to their liberty.

45. This classification is arbitrary, irrational, unrelated to any valid purpose of providing the services,

and is unsupported by any reasonable justification. Therefore, these classifications deprive the Plaintiffs and the class they seek to represent of their right to equal protection guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States and Article I, section eighteen of the Constitution of the State of Idaho.

46. As a result of said deprivation, the Plaintiffs and the class they seek to represent have suffered, are suffering and will continue to suffer an actual great, immediate and irreparable injury.

VII. SECOND CAUSE OF ACTION:

DUE PROCESS

47. The Defendants policies and practices and the Defendants failures and refusals to provide adequate or appropriate treatment and educational programs, and their failure to provide this treatment and education in the least restrictive setting consistent with the Plaintiffs' needs, denies the named and class Plaintiffs their right to due process of law under the Fifth and Fourteenth Amendments to the United States Constitution; and under Article I, sections one and thirteen of the Idaho Constitution.

48. The named Plaintiffs and the class they seek to represent have property and liberty interests, secured under state and federal law, to a sound, coordinated system of appropriate mental health services delivered in the least restrictive environment appropriate to their needs, and with the goal of providing these Plaintiffs with

an opportunity to develop their full potential. The state Defendants, having failed to adopt ascertainable and reasonable standards for provision of services, and having thereby exhibited a pattern and practice of arbitrarily depriving these Plaintiffs of their rights, have deprived the Plaintiffs of their rights to due process guaranteed by the Constitutions of the United States and the State of Idaho.

49. The acts, practices and policies of the state Defendants have combined to deprive these Plaintiffs of said rights without due process of law. As a result of said deprivation, these Plaintiffs and the class they seek to represent, have suffered, are suffering and will continue to suffer actual and irreparable injury.

VIII. THIRD CAUSE OF ACTION

REHABILITATION ACT OF 1973

50. Pursuant to the Rehabilitation Act of 1973 (Rehabilitation Act hereinafter, 29 U.S.C. § 794), the Idaho State Department of Health and Welfare is, as a recipient of federal funds, prohibited from discriminating against handicapped persons, including mentally impaired and/or emotionally ill children and adolescents.

51. Regulations properly promulgated and adopted pursuant to the Rehabilitation Act provide that recipients of funding, including the Idaho State Department of Health and Welfare, which provides health, welfare or other social services or benefits, may not deny those services to any qualified handicapped person, and further may not provide less effective services to some than those pro-

vided to others. 29 U.S.C. § 794; 45 C.F.R. §§ 84.4(b) (1) and 84.52.

52. The regulations also prohibit a recipient such as the Idaho State Department of Health and Welfare from denying or providing less effective aid, benefits or services to some handicapped children, than it does to other handicapped children, through its contracts, licensing or other arrangements. 45 C.F.R. §§ 84.4(b) (1), 84.52.

53. Finally, the Idaho State Department of Health and Welfare is prohibited under the regulations, either directly or through contract, from utilizing criteria or methods of administration that have the effect of perpetuating discrimination against any handicapped person(s) or group. 45 C.F.R. § 84.4(b) (4).

54. The obligations imposed on the Idaho State Department of Health and Welfare by the Rehabilitation Act are in no way obviated or alleviated by limitations of state law on the eligibility of qualified handicapped persons to receive services. 45 C.F.R. § 84.10.

55. The acts, practices and policies of the state Defendants have created three groups of children and adolescents. The first group of children and adolescents are those that receive all special treatment and educational services necessary; the second group is comprised of those children and adolescents who are receiving mental health and educational services but not in the least restrictive environment appropriate to their needs; the third group is comprised of those children and adolescents who are not receiving appropriate mental health and educational services in the environment that is not the least restrictive to their needs. This classification is ar-

bitrary, irrational, unrelated to any valid purpose of providing the services, and is unsupported by any reasonable justification. Therefore, these classifications discriminate against the members of the Plaintiff class in violation of the Rehabilitation Act of 1973.

56. The Idaho State Department of Health and Welfare consistently fails and refuses to provide needed mental health services to otherwise qualified emotionally ill and/or mentally impaired children and adolescents. The Idaho State Department of Health and Welfare has failed to provide those effective services both directly and through contract, and has perpetuated discrimination by continuing to fund and contract with programs that refuse to treat and educate those children and adolescents in the least restrictive alternative setting to the detriment and harm of the Plaintiffs and the class they represent in violation of the rehabilitation act of 1973.

57. The Regulations at 45 C.F.R. § 84.33 further provide that the Defendant, as a recipient of federal funds, must provide a free and appropriate education and related services designed to meet the individual educational needs of the handicapped children under their jurisdiction regardless of the nature of severity of the handicap. Such education and services must, under the Act, be provided in the least restrictive setting appropriate. 45 C.F.R. § 84.34.

58. The Defendants consistently fail and refuse to provide said educational and related services in the least restrictive setting appropriate, to the detriment and harm of the named Plaintiffs and the class they seek to represent and in violation of the Rehabilitation Act of 1973.

VIII. FOURTH CAUSE OF ACTION:

THE EDUCATION FOR ALL HANDICAPPED CHILDREN ACT

59. Pursuant to the Education for All Handicapped Children Act (Education Act hereinafter, 20 U.S.C. §§ 1401, et seq.), the Idaho State Department of Education receives certain funds for the purpose of providing free and appropriate special education to handicapped children, both directly and through local and intermediate educational agencies.

60. As a condition precedent to receipt of those funds, the State Deparument of Education must submit, for approval by an Agency of the United States Government, a plan which contains assurances of compliance with the provisions of the Education Act and its accompanying regulations. 45 C.F.R. § 121a.110.

61. Among other statutory and regulatory requirements, the Education Act requires that those local and intermediate educational agencies which receive funds provide a "free and appropriate education" and "related services" (defined under the Act to include *inter alia,* psychological services, counseling services and diagnostic medical services) to handicapped children, including seriously emotionally disturbed children, in the least restrictive setting appropriate to their needs. 20 U.S.C. §§ 1401, 1415, 1412; 45 C.F.R. §§ 121a.13, 121a.550 *et seq.*, 121a.4.

62. "Free and appropriate education" and "related services" are to be determined for each and every handicapped child between the ages of three and twenty-one

by means of an individualized educational program, immediate implementation of which must be insured by the State Department of Education in order to comply with the Act. 20 U.S.C. § 1401; 45 C.F.R. §§ 121a.340 *et seq.* The State Department of Education must also insure that procedures are established and implemented that make available a continuum of alternative placements, including residential placements, to meet the needs of handicapped children. 20 U.S.C. § 1412(b); 45 C.F.R. § 121a.551.

63. Where any local educational agency is unable or unwilling to establish or maintain programs providing a free and appropriate education, the State Department of Education must, itself, provide special education and related services directly, by contract, or through other arrangements. 45 C.F.R. § 121a.360.

64. The Education Act further requires that the State Department of Education be immediately and singly responsible for the provision of statewide free and appropriate education including residential special education and related services so that the failure statewide to deliver those services is attributable directly to the State Department of Education. 20 U.S.C. §§ 1412, 1413.

65. Plaintiffs, and the class they seek to represent, have not received their free and appropriate residential education or the related mental health services appropriate to their needs due to the failure of the Idaho State Department of Education to fulfill its responsibility by providing those services either directly, by insuring their provision through local and intermediate educational agencies, or through interagency contract by purchasing said services from the Idaho State Department of Health

and Welfare. All of which is in violation of the Education Act.

66. The regulations of the Department of Education under the Education Act require, at 45 C.F.R. § 121a.552(a) (3), that each state agency insure that each handicapped child's educational placement is as close as possible to the child's home. The placement of Idaho children in Texas or at any other location out of the State of Idaho is almost never a placement as close to the child's home as possible, and thereby violates the Education Act.

67. The Education Act requires at 20 U.S.C. § 1412 (5) that, to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are to be educated with children who are not handicapped and that special classes, separate schooling, or other removal of handicapped children from the regular educational environment occurrs only when necessary. The regulations at 45 C.F.R. 121a.551 require each public agency to insure that a continuum of alternative placements (regular classes, special classes, special schools, residential instruction and institutional instruction) be available to meet the needs of the handicapped children.

68. The placement by Defendants of children out of state or at State Hospital South is not a placement in the least restrictive alternative necessary to meet the needs of a child and violates the Education of All Handicapped Children Act to the harm of the Plaintiffs and the members of their class.

IX. FIFTH CAUSE OF ACTION:

DEVELOPMENTAL DISABILITIES ASSISTANCE BILL OF RIGHTS ACT

69. (1) The Idaho State Department of Health and Welfare is, as a matter of law and as a recipient of Federal funds, required to provide certain services under the Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. §§ 6001, et seq. (Disabilities Act hereinafter).

70. Under the Disabilities Act "developmental disabilities" means a disability of a person which is attributable to mental retardation or any other condition of a person found to be closely related to mental retardation because such condition results in similar impairment of general intellectual functioning or adaptive behavior to that of mentally retarded persons or requires treatment and services similar to those required for such persons. 42 U.S.C. § 6001(7). This definition includes the Plaintiffs and the class they represent.

71. Persons with developmental disabilities have a right to appropriate treatment, services, and habilitation for such disabilities. 42 U.S.C. § 6010(1).

72. The treatment, services, and habilitation for a person with developmental disabilities should be designed to maximize the developmental potential of the person and should be provided in the setting that is least restrictive of the person's personal liberty. 42 U.S.C. § 6010(2).

73. The Defendants have consistently failed to provide appropriate treatment, services, education and habilitation designed to maximize the developmental potential

of the Plaintiffs and the class they represent in the setting that is least restrictive of the person's personal liberty.

74. The Defendants have or should have knowledge of their failure to provide the services required by the Disabilities Act to the Plaintiffs and the class they represent. The Defendants have consistently failed to provide these services, to the detriment and harm of the named Plaintiffs and the class they represent.

X. SIXTH CAUSE OF ACTION:

COMMUNITY MENTAL HEALTH CENTERS ACT

75. Pursuant to the Community Mental Health Centers Act, as amended (hereinafter Act, 42 U.S.C. §§ 2689, *et seq.*), Defendant Klein, or his predecessor in office, of the Idaho State Department of Health and Welfare, has submitted certain plans and in return received funds from an agency of the United States Federal Government (hereinafter U.S.)

76. The plans submitted by the Idaho State Department of Health and Welfare are subject to the prior approval of the U.S. before any funds are allocated to the state and the community mental health centers under the Act. Once allocated, funds are distributed to community mental health centers (hereinafter "center(s)") subject to the approval of the U.S.

77. As a condition of funding, each center which has received funding for three years, must provide, as part of its services, *inter alia*, a program of specialized services for the mental health of children including a full range of

diagnostic treatment, liason and follow-up services. 42 U.S.C. § 2689(b) (1) (B) (ii).

78. The Act further reqiures that every center, from the date of its initial funding, provide assistance to Courts and other public agencies in screening all individuals for provisions of services through the center as an alternative to more restrictive inpatient treatment. 42 U.S.C. § 2689 (b) (1) (A) (ii).

79. The provision of these comprehensive mental health services must, pursuant to the Act, be coordinated with the provisions of services by other health and social service agencies, including state mental health facilities, to insure that persons are receiving services as they may require. The center's services must be appropriate, available and accessible to the residents of the area promptly, and delivered in a manner which preserves human dignity and assures continuity and high quality care and which overcomes geographic, cultural, linguistic and economic barriers to the receipt of services. When medically necessary, services must be available and accessible twenty-four hours a day and seven days a week. 42 U.S.C. § 2689(b)(2).

80. The Idaho State Department of Health and Welfare has failed to establish and carry out plans designed to eliminate inappropriate placement in institutions of children and adolescents with mental health problems and has further failed to insure the availability of appropriate non-institutional services for such children and adolescents, all in violation of the Act.

81. The Idaho State Department of Health and Welfare, acting in disregard of the obvious and mandated priority of serving Plaintiff children and the class they

represent, has consistently failed and refused, due to its acts and omissions, to properly administer, supervise and implement a plan for such services, all to the detriment of the Plaintiffs and the class they represent.

82. The Plaintiffs herein, and the class they represent, have been denied the comprehensive services required under the Act by the Idaho State Department of Health and Welfare despite their recognized need for the services.

XI. SEVENTH CAUSE OF ACTION:

RIGHT TO TREATMENT IN FACILITIES

83. Idaho Constitution Article X, section 1 provides that educational, reformatory, and penal institutions, and those for the benefit of the insane, blind, deaf and dumb, and such other institutions as the public good may require, shall be established and supported by the State in such manner as may be prescribed by law.

84. On information and belief Defendants do not provide the institutions that are required for the treatment and education for the members of the Plaintiff class in the least restrictive alternative setting.

XII. EIGHTH CAUSE OF ACTION:

STATE EDUCATION STATUTES

Education of the Handicapped or others unable to Attend School.

85. The Idaho State Department of Education is responsible for the establishment programs, and employment of such supervisory and clerical personnel as may be

required to assist and direct school districts in educating handicapped children. Idaho Code § 33-2003.

86. A handicapped child includes a mentally handicapped child who is any educable minor between the ages of six (6) and twenty-one (21) years whose intellectual development renders him incapable of being practically and efficiently educated by ordinary classroom instruction and who may be reasonably expected to benefit from special programs. Idaho Code § 33-2002. The Plaintiffs and the members of their class are mentally handicapped children within the meaning of this act.

87. The Idaho State Department of Education has not established programs or employed such personnel as may be required to assist and direct the school districts in educating Plaintiffs and the members of their class.

88. The Defendants acts, practices and policies have combined to deprive the Plaintiffs and their members of their class of an education, causing them great harm.

XIII. NINTH CAUSE OF ACTION:

SEGREGATION OF CHILDREN FROM THOSE TREATED AS ADULT OFFENDERS

89. Idaho Code § 16-1812(A)(1) requires that juvenile detention facilities must be so constructed and/or maintained as to keep children segregated from adult offenders or those treated as adult offenders with their being no contact as to sight and/or sound between the two classes.

90. The practice of the Defendants results in the placement of many of the named and class Plaintiffs in state institutions like State Hospital South where there

is contact with those who are treated as criminal offenders and are either being evaluated, unfit to stand trial, or acquitted of a crime on the grounds of a mental illness under Idaho Code §§ 18-211, 18-212 or 18-214 respectively.

91. The placement of the Plaintiff class with those who are treated as adult offenders, such that there is contact as to sight and sound between the two groups violates the rights of the Plaintiff class under Idaho Code section 16-1812(A)(1). This has caused and will continue to cause great, immediate and irreparable harm to Plaintiffs and the members of their class.

IRREPARABLE HARM

92. The Plaintiffs allege that they have suffered and will continue to suffer irreparable harm to their civil rights and rights of liberty and property due to the Defendants actions, or failure to act, for which there is no adequate remedy at law.

PRAYER

WHEREFORE, Plaintiffs pray that this Court:

1. Assume jurisdiction over this action;

2. Certify the action as a class action with the classes described above;

3. Issue a preliminary injunction on behalf of the named Plaintiffs ordering the Defendants to:

   a. immediately provide appropriate education and related mental health services, so far as possible, to the Plaintiffs and the members of their class.

b. segregate all those in Plaintiffs class from all those over age 21 at State Hospital South;

4. Issue a permanent injunction ordering the Defendants to:

a. provide the Plaintiff class with appropriate, prescribed education and related mental health services including, where appropriate, diagnosis, evaluation, therapy, counseling, emergency inpatient and long or short term community based residential mental health services in the setting least restrictive of personal liberty.

b. immediately establish such procedures, agreements, contracts and policies as will insure an available, accessible and complete continuum of alternative, community-based residential programs providing education and related mental health services in the setting least restrictive of personal liberty statewide.

c. to never again admit anyone in Plaintiff case to State Hospital South;

5. Retain jurisdiction over Defendants until such time as the Court is satisfied that the acts and omissions alleged herein no longer exist and will not reoccur;

6. Award such attorney's fees and costs as are allowable pursuant to 42 U.S.C. § 1988;

7. Award such other relief, legal and equitable, as this Court may deem just and proper.

Plaintiffs, by their attorneys,

/s/ Charles Johnson
/s/ Russell E. Webb

(Certificate or Affidavit of Service Omitted in Printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

CIV NO. 80-4091

JEFF D., PAULA E., JOHN M., and DUSTY R., minors, by and through their next friend individually and on behalf of the class they represent,

Plaintiffs,

v.

JOHN V. EVANS, individually and in his official capacity as Governor of the State of Idaho;

MILTON G. KLEIN, individually and in his official capacity as Director of the Idaho State Department of Health and Welfare;

JERRY EVANS, individually and in his official capacity as State Superintendent of Public Instruction of the Idaho State Department of Education;

GEORGE BACHIK and CARROLL ELMORE, individually and in their official capacities as Directors of State Hospital South;

Their Successors to Office, Title and Interest,

Defendants.

ORDER APPOINTING NEXT FRIEND

(Filed August 4, 1980)

On reading the written Petition for Appointment of Next Friend for Infant Plaintiffs and the Class they Represent, and for good cause shown:

IT IS ORDERED that Charles Johnson be, and hereby is, appointed the next friend of the Plaintiffs and the class they represent, for the sole purpose of instituting and prosecuting an action in this court on behalf of said

infants for relief from the Defendants, as set forth in the petition for the appointment of the Next Friend.

DATED this 4th day of August, 1980.

/s/ Marion J. Callister
District Court Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

CASE NO. CIV 80 4091

(Title omitted in printing)

ANSWER

COME NOW, The Defendants, and each of them, and pleads to and otherwise answer Plaintiffs' Complaint as follows:

I.

DEFENSES

1. Defendants move to dismiss Plaintiffs' Complaint for failure to state a claim upon which relief can be granted in that Plaintiffs have failed to exhaust administrative remedies available to them.

2. Defendants move to dismiss Plaintiffs' Complaint for failure to state a claim upon which relief can be granted on the grounds that this matter is a matter against the State, prohibited by the Eleventh Amendment of the United States Constitution.

3. Defendants move to dismiss Plaintiffs' Complaint for the reason that Plaintiffs have failed to join indispensable parties.

4. Defendants move to dismiss Plaintiffs' Complaint in that the Court lacks jurisdiction to hear and determine the subject matter of this action for the reason that plaintiffs have failed to exhaust administrative remedies available to them.

5. Defendants move to dismiss Plaintiffs' Complaint for the reason that the Court lacks jurisdiction to hear this matter on the grounds that this action is against the State of Idaho, and therefore is prohibited by the Eleventh Amendment of the United States Constitution.

II.

ANSWERS

By way of answer to Plaintiffs' allegations, Defendants admit, deny and allege as follows:

1. Defendants deny every allegation contained in Plaintiffs' Complaint to which they do not specifically admit.

2. Defendants admit each and every allegation contained in the following paragraphs of Plaintiffs' Complaint:

(9), 10, 12, 30, 43, 50, 51, 52, 53, 54, 59, 60, 61, 63, 67, 69, 71, 72, 75, 76, 77, 78, 79, 83.

3. Defendants deny each and every allegation contained in the Following paragraphs of Plaintiffs' Complaint:

16, 19, 20, 24, 35, 41, 42, 44, 45, 46, 47, 49, 55, 56, 58, 65, 68, 73, 74, 80, 81, 82, 84, 87, 88, 91, 92.

4. Paragraph 1 of Plaintiffs' Complaint contains assertions of law and needs no answer. However, to the extent that the allegations contained therein do require a reference the same are denied.

5. As to Paragraph 2 of Plaintiffs' Complaint, defendants admit that some Plaintiffs are hospitalized and

others are attending residential and educational treatment centers outside the State of Idaho, including Texas, but deny each and every other allegation contained therein.

6. As to Paragraph 3 of Plaintiffs' Complaint, the allegations contained therein are assertions of law and need no answer. However, to the extent said assertions do require an answer, the same are denied.

7. As to Paragraph 4 of Plaintiffs' Complaint, Defendants admit that Plaintiff Jeff D. is a patient at State Hospital South, Bingham County, a facility of the State of Idaho Department of Health and Welfare. However, Defendants are without sufficient knowledge of information to form a belief as to the truth of Jeff D.'s residency or will, as alleged.

8. As to Paragraph 5 of Plaintiffs' Complaint, Defendants admit that Plaintiff, Paula E. is a patient at State Hospital South, Bingham County, a facility of the State of Idaho Department of Health and Welfare, but are without sufficient knowledge or information to form a belief as to the truth of Paula E.'s residency or will, as alleged.

9. As to Paragraph 6 of Plaintiffs' Complaint, Defendants admit that Plaintiff, John M. is currently at the Devereaux Foundation, Texas Branch, Victoria, Texas, a psychiatric facility on contract to the Idaho Department of Health and Welfare, but are without sufficient knowledge or information as to John M.'s residency or will.

10. As to Paragraph 7 of Plaintiffs' Complaint, Defendants admit that Plaintiff, Dusty R. was at State Hospital South, the Idaho Youth Ranch and is now in a

group home in Boise, Idaho, but are without sufficient knowledge or information to form a belief as to the truth of his residency or will.

11. As to Paragraph 8 of Plaintiffs' Complaint, Defendants admit that Charles Johnson is a citizen of Idaho, a resident of Bonneville County, Idaho, and that he sues on behalf of the above-named children as next friend. Defendants deny each and every other allegation contained herein.

12. As to Paragraph 11 of Plaintiffs' Complaint, the allegations therein are conclusions of law and require no answer. However, to the extent that an answer is required, the allegations are denied.

13. As to Paragraph 13 of Plaintiffs' Complaint, Defendants admit that the Defendants acted pursuant to state law. Defendants admit that they are state officers. The remainder of the allegations contained in Paragraph 11 of Plaintiffs' Complaint are conclusions of law which require no answer.

14. As to Paragraph 14 of Plaintiffs' Complaint Defendants deny that Plaintiffs have not been provided with appropriate treatment and educational programs in the least restrictive alternative setting. Defendants are without sufficient information or knowledge to form a belief as to the truth of the appropriate class to which Plaintiffs belong, if any. The remainder of the allegations contained in Paragraph 14 of Plaintiffs' Complaint are conclusions of law which require no answer. However, to the extent that such allegations do require answers, the same allegations are denied.

15. As to Paragraph 15 of Plaintiffs' Complaint, Defendants are without sufficient knowledge or information to form a belief as to the truth of the allegations contained herein.

16. As to Paragraph 17 of Plaintiffs' Complaint, Defendants are without knowledge or information to determine the meaning of Plaintiffs' allegation of "normal school setting" and therefore deny the same. Defendants admit all other allegations contained herein.

17. As to Paragraph 18 of Plaintiffs' Complaint, Defendants admit that Plaintiff, Jeff D. is in the custody of the Idaho Department of Health and Welfare pursuant to court order. However, Defendants are without sufficient knowledge or information to form a belief as to the truth of all other allegations contained in Paragraph 18 of Plaintiffs' Complaint.

18. As to Paragraph 21 of Plaintiff's Complaint, Defendants admit that they have knowledge of the conditions and needs of Plaintiff, Jeff D. Defendants deny each and every other allegation contained in Paragraph 21 of Plaintiffs' Complaint.

19. As to Paragraph 22 of Plaintiffs' Complaint, Defendants are without knowledge or information to determine the meaning of Plaintiffs' allegation of "normal school setting" and therefore deny the same. Defendants admit all other allegations contained therein.

20. As to Paragraph 23 of Plaintiffs' Complaint, Defendants admit that Plaintiff, Paula E. is a patient at State Hospital South. Defendants deny that such placement is inappropriate. Defendants are without suffi-

cient knowledge or information to form a belief as to the truth of all other allegations contained therein.

21. As to Paragraph 25 of Plaintiffs' Complaint, Defendants deny that Plaintiff Paula E. has not received appropriate treatment and education. However, Defendants do not have sufficient knowledge or information to form a belief as to the truth of all other allegations contained herein.

22. As to Paragraph 26 of Plaintiffs' Complaint, Defendants admit that they have knowledge of Plaintiff Paula E.'s conditions and needs. Defendants deny each and every other allegation contained therein.

23. As to Paragraph 27 of Plaintiffs' Complaint, Defendants admit that Plaintiff John M. is a fifteen-year-old child with emotional problems, possible mild mental retardation and other handicaps, and has experienced problems caused by anti-social behavior. Defendants deny each and every other allegation contained therein.

24. As to Paragraph 28 of Plaintiffs' Complaint, Defendants admit that Plaintiff John M. is physically located in Texas. However, Defendants allege that he was transferred from Region IV of the Idaho Department of Health and Welfare, not State Hospital South. Defendants are without sufficient knowledge or information to form a belief as to the truth of every other allegation contained therein.

25. As to Paragraph 29 of Plaintiffs' Complaint, Defendants admit they have knowledge of the handicaps and needs of Plaintiff John M., but deny each and every other allegation contained therein.

26. As to Paragraph 31 of Plaintiffs' Complaint, Defendants admit that Plaintiff, Dusty R. was admited to State Hospital South in May of 1980 for evaluation under the provisions of the Child Protective Act. Defendants admit that said Plaintiff was transferred to the Youth Ranch and a group home in Boise, both facilities on contract with the Idaho Department of Health and Welfare. Defendants are without sufficient information and knowledge to form a belief as to the truth of all other allegations contained therein.

27. As to Paragraph 32 of Plaintiffs' Complaint, Defendants admit that said Plaintiff is being treated and educated. Defendants are without sufficient knowledge to form a belief as to the truth of the allegation that said Plaintiff's conditions are or can be improved. Defendants deny each and every other allegation contained in said Paragraph 32.

28. As to Paragraph 33 of Plaintiffs' Complaint, Defendants deny the allegations contained therein as to the members in the class, if any, the extent of their handicaps and the nature of the facility of their placement.

29. As to Paragraph 34 of Plaintiffs' Complaint, Defendants are without sufficient knowledge or information to form a belief as to the truth of the allegations contained therein.

30. As to Paragraph 36 of Plaintiffs' Complaint, Defendants admit that Plaintiffs suffer from treatable conditions, but deny that their present treatment and education are inappropriate.

31. As to Paragraph 37 of Plaintiffs' Complaint, Defendants admit they have knowledge of Plaintiffs' con-

ditions and needs, but deny each and every other allegation contained therein.

32. As to Paragraph 38 of Plaintiffs' Complaint, Defendants are without sufficient knowledge and information to form a belief as to the truth of the allegations contained therein.

33. As to Paragraph 39 of Plaintiffs' Complaint, Defendants admit that some of the children are or will be placed in facilities in Idaho under contract to the Idaho State Department of Health and Welfare. Defendants deny each and every other allegation contained therein.

34. As to Paragraph 40 of Plaintiffs' Complaint, Defendants are without sufficient knowledge or information to form a belief as to the truth of the allegations contained therein. Said allegations are speculative. Defendants deny that at State Hospital South these children will not receive appropriate treatment and education in the least alternative setting.

35. As to Paragraph 48 of Plaintiffs' Complaint, Defendants admit that the named Plaintiffs and the class they seek to represent, if any, have property and liberty interests, secured under state and federal law, to a sound, coordinated system of appropriate mental health services delivered in the least restrictive environment appropriate to their needs, and with the goal of providing these Plaintiffs with an opportunity to develop their full potential. Defendants deny each and every other allegation contained therein.

36. As to Paragraph 57 of Plaintiffs' Complaint, Defendants admit the allegations contained therein, and

further allege that there are other entities not parties hereto that have obligations under 45 CFR § 84.33 and 45 CFR § 84.34.

37. As to Paragraph 62 of Plaintiffs' Complaint, Defendants admit that the State Department of Education must also insure that procedures are established and implemented that make available a continuum of alternative placements, including residential placements, to meet the needs of handicapped children. 20 U.S.C. § 1412 (b); 45 CFR § 121a.551. Defendants deny each and every other allegation contained therein.

38. As to Paragraph 64 of Plaintiffs' Complaint, the allegations contained therein are conclusions of law to which no answer is required. However, if an answer thereto is required, Defendants deny the same as an accurate description of the law.

39. As to Paragraph 66 of Plaintiffs' Complaint, Defendants admit that the regulations of the Department of Education under the Education Act require, at 45 C.F.R. § 121a.552(a) (3), that each state agency insure that each handicapped child's educational placement is as close as possible to the child's home. Defendants deny each and every other allegation contained therein.

40. As to Paragraph 70 of Plaintiffs' Complaint, Defendants are without sufficient knowledge or information to form a belief as to whether or not the definition contained therein includes Plaintiffs' and the class, if any, they represent. Defendants admit every other allegation contained therein.

41. As to Paragraph 85 of Plaintiffs' Complaint, Defendants deny each and every allegation contained

therein. However, Defendants admit that the State Board of Education has such responsibility.

42. As to Paragraph 86 of Plaintiffs' Complaint, Defendants deny the accuracy of Plaintiffs' definition contained therein. Defendants are without sufficient knowledge and information to form a belief as to whether or not said definition includes Plaintiffs and the class, if any, may represent.

43. As to Paragraph 89 of Plaintiffs' Complaint, Defendants admit each and every allegation contained therein. However, for purposes of Section 616-1812 (A) (1), State Hospital South is not a juvenile detention facility.

44. As to Paragraph 90 of Plaintiffs' Complaint, Defendants admit that Plaintiffs Jeff D. & Paul E. are patients at State Hospital South. They are in a residence called Eagle Lodge where some other patients are residing who have been hospitalized pursuant to Idaho Code Sections 18-211, 18-212, and 18-214. Defendants deny that State Hospital South is a juvenile detention center.

Wherefore, Defendants pray that:

1. Plaintiffs' Complaint be dismissed with prejudice;

2. That Plaintiffs take nothing by their cause of action;

3. For costs and reasonable attorneys' fees as provided by law; and

4. For such other further relief the Court deems proper.

DATED this ..... day of September, 1980.

DAVID H. LEROY
ATTORNEY GENERAL

.....
JAMES R. HARGIS
Deputy Attorney General

.....
STEVEN W. BERENTER
Deputy Attorney General

(Certificate or Affidavit of Service Omitted in Printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Case No. 80-4091

JEFF D., PAULA E., JOHN M., DUSTY R., minors, individually and on behalf of the class they represent, by and through their next friend, CHARLES JOHNSON and MARK CLARY, Intervenor,

Plaintiffs,

vs.

JOHN V. EVANS, LES PURCE, JERRY EVANS, GEORGE BACHIK and CARROLL ELMORE, individually and in their official capacities as employees and agents of the Idaho State Department of Health and Welfare,

Their Successors in Offices, Titles and Interests,

Defendants.

STIPULATION IN SETTLEMENT OF CLAIMS AGAINST EDUCTION DEFENDANTS AND FOR PROVISION OF EDUCATION SERVICES; AND ORDER

COMES NOW the plaintiffs in the above entitled action by and through their counsel and defendant Jerry Evans, individually and in his official capacity as State Superintendent of Public Instruction of the Idaho State Department of Education, and hereby stipulate as follows:

1. This is a class action for declaratory and injunctive relief on behalf of the named plaintiffs and the class they represent consisting of all Idaho children under the age of twenty-one (21) who now or will in the future, suffer from emotional or mental handicaps and who are, or will in the future, be institutionalized or otherwise placed in residential programs of defendants. Plaintiffs and the

class they represent seek relief from the defendants' alleged failure to provide adequate or appropriate treatment and educational programs in the least restrictive setting in violation of plaintiffs' rights under the Fifth (5th) and Fourteenth (14th) Amendments to the United States Constitution; Article I, Section One, Thirteen and Eighteen, and Article X, Section One of the Constitution of the State of Idaho; the Community Mental Health Centers Act (42 U.S.C.A. 2661); the Rehabilitation Act of 1973 (29 U.S. C.A. 794); the Education for all Handicapped Children Act (20 U.S.C.A. 1401); the Developmental Disability Assistance and Bill of Rights Act (42 U.S.C.A. 6000); the Idaho State Education of the Handicapped and Others Unable to Attend School Statutes (Idaho Code Section 33-2001) and the Idaho Youth Rehabilitation Act (Idaho Code Section 16-1800).

The named plaintiffs and the class they represent have property and liberty interests, secured under those federal and state laws, to a sound, coordinated system of appropriate mental health services delivered in the least restrictive environment appropriate to their needs, and with the goal of providing these plaintiffs with the opportunity to develop their full potential.

2. Jurisdiction is conferred on the Court by 28 U.S. C.A. 1343(3) and (4) for claims for relief arising under 42 U.S.C.A. 1983. Jurisdiction is conferred on this court to hear claims under the Education for all Handicapped Children Act (20 U.S.C.A. 1401) by 20 U.S.C.A. 1415(e)(3). Plaintiffs' action for declaratory relief is authorized by 28 U.S.C.A. 2201 and 2202. Plaintiffs' state claims may properly be considered under the exercise of this court's pendant jurisdiction.

3. Defendant John V. Evans is a citizen of the State of Idaho, Governor of the State of Idaho and the ex officio Director of the Budget for the State. As Director of the Budget, defendant Evans has executive authority for reviewing the budget requests of state agencies, determining budgetary needs for each state agency and submitting to the Idaho State Legislature of a proposed budget for all state agencies.

4. Defendant Les Purce is the Director of the Idaho State Department of Health and Welfare and has statutory administrative responsibility for the State's treatment programs for children in the State who are committed to institutions of said Department.

5. Defendant Jerry Evans is the State Superintendent of Education in Idaho. In this capacity he is responsible for planning, developing and monitoring (by contract or otherwise) the educational programs in Idaho for juveniles between the ages of five (5) and twenty-one (21) years, including plaintiffs and the class they represent.

6. Defendants George Bachik and Carroll Elmore are, respectively, the Administrative and Clinical Directors of State Hospital South in Blackfoot, Bingham County, State of Idaho, a facility of the Idaho State Department of Health and Welfare. In these capacities they are responsible for the custody, care and treatment of part of the plaintiff class.

7. The defendants are sued and are responsible in their official capacities and at all times material to this action, they have acted under color of state law, custom and usage of the State of Idaho. Their successors in office, title and interest are also named as defendants and

are responsible in this action and responsible for compliance with this Stipulation.

8. There are over two thousand (2,000) handicapped children who come within the definition of the class as defined by plaintiffs. The members of the class are so numerous that joinder of all members is impractical. The predominant questions of law and fact are common to all members of the class, including the alleged policies and practices challenged in this action which defendants apply consistently to similarly situated members of the class. The claims of the named plaintiffs are typical of the claims of the class and the plaintiffs will fairly and adequately protect the interests of the entire class. The declaratory and injunctive relief sought by the named plaintiffs is typical of the relief sought by all members of the class. The prosecution of separate actions by or against individual members would create a risk of inconsistent or varying adjudications with respect to individual class members which would, as a practical matter, be dispositive of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests and, in either event, the defendants have acted or refused to act on grounds generally applicable to the class, thereby making appropriate final declaratory and injunctive relief with respect to the class as a whole.

9. The parties stipulate that this court shall certify this action as a class action pursuant to Federal Rules of Civil Procedure 23(b) (1) and (2) with the class defined as follows:

> All Idaho youths under the age of twenty-one (21) years who suffer from emotional or mental illness, either alone or in conjunction with another mental de-

fect(s), and who because of such afflictions or conditions are placed in the care and custody of the Idaho State Department of Health and Welfare as follows:

A. In residence at State Hospital South, Blackfoot, Idaho, or State Hospital North, Orofino, Idaho;

B. In residence in any institution outside of the State of Idaho; or

C. In residence in any facility for the treatment, detention or housing of such youths within the State of Idaho that is operated by or under contract with the State of Idaho; specifically excluding the Idaho State School and Hospital in Nampa, Idaho.

10. Plaintiffs seek free appropriate public education and treatment for their handicaps in the setting least restrictive of personal liberty. Defendant Jerry Evans and the Idaho State Department of Education enter into this Stipulation as a compromise of disputed claims and do not admit any failure, liability or defalcation for past actions. The parties enter into this Stipulation in settlement and compromise of the claims contained in the class action Complaint for Declaratory and Injunctive Relief and Intervenor's Complaint on file herein.

11. Jerry Evans, individually and in his official capacity as State Superintendent of Public Instruction of the Idaho State Department of Education and the Idaho State Department of Education hereby stipulate and agree that:

a. The Idaho State Department of Education as lead agency shall ensure that a free and appropriate public education is provided plaintiffs and the class they represent, between the ages of five (5) and twenty-one (21) through arrangements with local school districts or other entities as required by the Education for All Handicapped

Children Act of 1975 (20 U.S.C. § 1401 et. seq., "The Act") and the Idaho State Education of the Handicapped and Others Unable to Attend School Statute (Idaho Code § 13-2001 et. seq., "The Statute").

b. Provided, however, that with respect to those plaintiffs who are placed in any institution outside the State of Idaho (paragraph 9.B. above), for other than educational purposes, the State Department of Education:

i. Has no responsibilities to ensure that a free appropriate public education is provided to each individual plaintiff in accordance with the Act or the Statute.

ii. Has a responsibility, in conjunction with other applicable agencies, to access the numbers and types of plaintiffs placed outside the State of Idaho (paragraph 9.B. above), to evaluate the ongoing educational programs provided to these plaintiffs, and make recommendations for the education of these plaintiffs; pursuant to the Act, the Statute and the regulations thereunder, now or as hereinafter amended. The State Department of Education will put these recommendations into effect so far as possible and shall, where necessary, make budgetary requests from the Idaho State Legislature in order to implement these recommendations.

iii. Notwithstanding, the Idaho State Department of Education has the responsibility, pursuant to the Act and the Statute, to ensure that these plaintiffs have available to them services generally equivalent to the education services provided to non-handicapped youth as set forth in paragraph 11(f) and to develop procedures for these plaintiffs as required by paragraph 11(j).

c. The educational philosophy in providing appropriate education services shall be that all plaintiffs and the class they represent between the ages of five (5) and twenty-one (21) are presumed to be capable of benefiting from education. Such plaintiffs shall be provided a free appropriate public education as defined by the Act and the State regardless of degree of handicap or accompanying disabilities.

d. Individual education evaluations and individual education plans shall be prepared for each plaintiff and the class they represent in conformity with the Act and the Statute, and the regulations thereunder (including 45 C.F.R. § 121.a) now or as henceforth amended. The child study teams shall secure prior educational records of each child. Each individual education plan shall be separate from, yet coordinated with, the treatment and the treatment plan of each plaintiff.

e. Education services for each plaintiff and the class they represent shall be provided in accordance with the individual education plan developed for each plaintiff and in the least restrictive environment as determined for each individual plaintiff as party of his or her individual education plan.

f. Education services for each plaintiff and the class they represent shall be generally equivalent to the education services provided to other youth in the State of Idaho in terms of:

i. Teacher and staff qualifications and in-service training;

ii. Program hours per student;

iii. Nature and quality of programs;

iv. Curriculum guides, resource and classroom materials and equipment; and

v. Class size and number of students per teacher.

g. Sufficient teacher's aides and other assistants shall be provided to plaintiffs and the class they represent in accordance with the Act and the Statute and the Administrative Rules and Regulations for Special Education as adopted by the Idaho State Board of Education.

h. Generally, the educational programs shall be provided to plaintiffs and the class they represent for six (6) hours per day. For this purpose, educational programs may include educational activities such as therapy, counseling, physical education and similar nonacademic programs of instruction. In exceptional cases, plaintiffs may receive fewer than six (6) hours of educational activity per week day if determined to be appropriate by a child study team responsible for the development of a plaintiff's individual education plan.

i. The State Department of Education shall develop, in conjunction with other applicable agencies and school districts, procedures to ensure that educational services are provided to plaintiffs and the class they represent in the least restrictive environment. To facilitate placement in the least restrictive environment, the Department shall seek out and develop education services in the local school districts for plaintiffs who are able to take advantage of such education services with the goal of providing these services to the plaintiff class in the local school districts as soon as possible.

j. The State Department of Education, in conjunction with other applicable agencies or school districts, shall develop procedures to ensure that the local school districts which will continue the education program for plaintiffs, and the class they represent, to be transferred to the community: (i) are advised of the timetable for any pending transfer; and (ii) are provided a written summary of the education programs of the student, a copy of the student's individual education plan, and any other relevant educational records in order to assure that appropriate educational programs/placements will be available without unreasonable delay.

k. The State Department of Education shall ensure the establishment of procedural safeguards as required by the Education for All Handicapped Children Act, 20 U.S.C. § 1401 et. seq., its accompanying rules and regulations, 45 C.F.R. Part 121(a), subpart F; the Statute and the Administrative Rules and Regulation for Special Education for the State of Idaho, now or as hereinafter amended, for plaintiffs and the class they represent. Such procedural safeguards shall be the method by which problems in, or complaints with, a child's individual Education Plan shall be addressed. However, complaints which reflect problems regarding the provision of education services to the plaintiff class, as addressed in this Stipulation, may be placed before this court for resolution, by contempt sanction or otherwise. Nothing in this Stipulation shall be construed to limit or otherwise alter the duties and responsibilities of local school districts as set forth by applicable State and Federal law.

12. General Provisions:

a. The defendant Jerry Evans and the Idaho State Department of Education shall act in concert in all cases and whenever necessary and possible with the other defendants in this action to help ensure the delivery of appropriate mental health and educational services to members of the plaintiff class in an individually appropriate setting that is least restrictive of personal liberty within the State of Idaho.

b. The defendants shall, on September 1, 1982, and every year thereafter for five (5) years or until the court otherwise so orders (see below), file a report with the above entitled court, with a copy to plaintiffs' counsel of record; such report shall detail the extent of defendants' compliance with this Consent Decree, and the future plans for compliance with this Consent Decree.

c. The parties will attempt to reconcile any difficulties with the implementation of this Consent Decree. However, the plaintiff class or their representatives (next friend or Idaho Legal Aid Services, Inc.) shall have the power to submit any dispute effecting the entire plaintiff class under this Consent Decree to the above entitled court for decision by contempt sanction or otherwise, should reconciliation fail.

d. The court will retain jurisdiction over this action for five (5) years or until the court is satisfied, by Stipulation or otherwise, that the actions and omissions complained of herein no longer exist and will not reoccur.

e. Each party shall bear their own attorney's fees and costs thus far incurred.

DATED this 14 day of October, 1981.

/s/ Charles Johnson
Next friend for Plaintiffs
Attorney for Plaintiffs

/s/ Russell E. Webb
Attorney at Law for Plaintiff Class

/s/ Jerry L. Evans
Director Idaho State Department of Education

/s/ Steve Berenter
Deputy Attorney General Idaho State Department of Education

ORDER OF THE COURT

Based on the above Stipulation, the settlement in the above entitled matter is hereby approved, and the provisions of the Stipulation are the order of this court. IT IS SO ORDERED.

DATED this 19th day of October, 1981.

/s/ Marion J. Callister
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Civil No. 80-4091

JEFF D., PAULA E., JOHN M., and DUSTY R., minors individually and on behalf of the class they represent, by and through their next friend, Charles Johnson,

Plaintiffs,

vs.

JOHN V. EVANS, MILTON G. KLEIN, JERRY EVANS, GEORGE BACHIK and CARROLL ELMORE, individually and in their official capacities, their Successors to Office, Title and Interest,

Defendants.

O R D E R

Plaintiffs and defendants having filed cross-motions for summary judgment, and the Court having reviewed the matter, heard the arguments of counsel and considered the briefs and all other pleadings filed in this matter; and the Court having filed its memorandum decision herein and in accordance with the findings and conclusions contained in said memorandum decision and as a matter of law;

IT IS HEREBY ORDERED:

1. That the defendants' motions for summary judgment on the basis that Idaho Code §§ 66-329, 66-344; Idaho Constitution, article X, section 1; 42 U.S.C. §§ 2689, 6010, 6065, and 29 U.S.C. § 794 do not support plaintiffs' claim that the State has an affirmative duty to provide additional facilities to offer treatment in the least restrictive

environment be, and the same is hereby, GRANTED; and

2. That the motions for summary judgment regarding the federal Constitution and Idaho Code § 39-4605 are hereby DENIED on the ground that genuine issues of material fact remain to be resolved.

DATED this 26th day of July, 1982.

/s/ Marion J. Callister
Chief Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Case No. CIV 80-4091

JEFF D., et al.,

Plaintiffs,

v.

JOHN V. EVANS, et al.,

Defendants.

STIPULATION FOR CLASS CERTIFICATION and ORDER

(Filed September 7, 1982)

COME NOW the parties to the above entitled cause of action and hereby stipulate that the class in this matter may be defined as follows:

All Idaho juveniles under the age of eighteen (18) years who have been or will be diagnosed by the Idaho State Department of Health and Welfare as suffering from emotional or mental illness, either alone or in conjunction with another mental defect(s), and because of such condition are placed in, or committed to, the care and custody of the Idaho State Department of Health and Welfare as follows:

A. In residence at State Hospital South, Blackfoot, Idaho, or State Hospital North, Orofino, Idaho;

B. In residence in any institution outside of the State of Idaho; or

C. In residence in any facility for the treatment, detention or housing of such youths within the state of Idaho; specifically excluding the Idaho State School and Hospital in Nampa, Idaho.

Dated this 2nd day of Septmber, 1982.

/s/ James Wickham
Attorney for Health and Welfare Defendants

/s/ Charles Johnson
Attorney for Plaintiffs

ORDER

Based on the above Stipulation, IT IS SO ORDERED.

/s/ Marion J. Callister
U.S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Case No. Civ. 80-4091

(Title omitted in printing)

RESPONSE TO REQUESTS
FOR ADMISSIONS

Pursuant to Rule 36, F.R.C.P., Defendants Thomas L. Pierce, George Bachik and Carroll Elmore respond to Plaintiffs Requests for Admissions dated September 3, 1982 as follows:

1. That the class in this matter may be defined as follows:

> All Idaho juveniles under the age of eighteen (18) years who have been or will be diagnosed by the Idaho State Department of Health and Welfare as suffering from emotional or mental illness, either alone or in conjunction with mental defect(s), and because of such condition are placed in, or committed to, the care and custody of the Idaho State Department of Health and Welfare as follows:
>
> A. In residence at State Hospital South, Blackfoot, Idaho, or State Hospital North, Orofino, Idaho;
>
> B. In residence in any institution outside of the State of Idaho; or
>
> C. In residence in any facility for the treatment, detention or housing of such youths, within the State of Idaho; specifically excluding the Idaho State School and Hospital in Nampa, Idaho.

RESPONSE: Admitted.

2. That this Court should order that the class in this matter be defined as follows:

> All Idaho juveniles under the age of eighteen (18) years who have been or will be diagnosed by the Idaho

State Department of Health and Welfare as suffering from emotional or mental illness, either alone or in conjunction with another mental defect(s), and because of such condition are placed in or committed to, the care and custody of the Idaho State Department of Health and Welfare as follows:

A. In residence at State Hospital South, Blackfoot, Idaho, or State Hospital North, Orofino, Idaho;

B. In residence in any institution outside of the State of Idaho; or

C. In residence in any facility for the treatment, detention or housing of such youths, within the State of Idaho; specifically excluding the Idaho State School and Hospital in Nampa, Idaho.

RESPONSE: Admitted.

3(a). There are over two thousand (2000) and perhaps as many as six thousand (6000) juveniles in Idaho under twenty-one (21) years of age who are, or will be in the future, institutionalized or otherwise placed at in residential programs outside their parents home (juveniles, hereinafter).

RESPONSE: Admitted.

3(b). Of these, about forty (40) to fifty (50) are at any one time, placed at State Hospital South in Blackfoot, Bingham County, State of Idaho.

RESPONSE: Denied.

4. *Jeff D.* was a seventeen (17) years old male (at the time this lawsuit was filed) who has been diagnosed as being emotionally disturbed with unsocialized aggression and mild mental retardation. At the age of fifteen

(15) years, he was removed from his home community setting and committed against his will to the custody of the Idaho State Department of Health and Welfare. He was placed in State Hospital South where he remained until he was "transferred" to the Youth Services Center in St. Anthony, Idaho; Youth Services Center is a facility of the Idaho State Department of Health and Welfare. Plaintiff Jeff D. has recently been readmitted to State Hospital South.

RESPONSE: Admitted, denied that he was "transferred" to the Youth Services Center.

5. *Paula E.* was a seventeen year old female (at the time this lawsuit was filed) who has been diagnosed as suffering from a boarderline personality disorder and mild mental retardation. At the age of fifteen (15) years she was removed from her home community setting and committed to the custody of the Idaho State Department of Health and Welfare. She was placed at an out of state treatment facility and then at State Hospital South where she remains to this day.

RESPONSE: Admitted.

6. *John M.* was a fifteen year old male (at the time this lawsuit was filed) who has been diagnosed as suffering from emotional problems, possible mild retardation, and other handicaps. He has experienced problems caused by anti-social behavior. John M. was committed to the custody of the Idaho State Department of Health and Welfare and placed at State Hospital South for a short period. However, the Idaho State Department of Health and Welfare then transferred John M. to the Deveraux

School in Victoria, Texas, a facility under contract to the Idaho State Department of Health and Welfare.

RESPONSE: Admitted.

7. *Dusty R.* was a twelve (12) year old male (at the time this lawsuit was filed) who has been diagnosed as having an adjustment reaction to childhood and other handicaps. Dusty has engaged in aggressive behavior toward some people which has resulted in his placement in a number of residential programs during the past several years. Dusty R. was admitted to State Hospital South in May, 1980, for evaluation. After a brief stay he was transferred to the Idaho Youth Ranch in Rupert, Idaho. The placement at the Idaho Youth Ranch was not satisfactory so he was transferred to a group home in Boise, Idaho.

RESPONSE: Admitted.

8. The defendants have had knowledge of the conditions of the named and class plaintiffs, and of the problems complained of in this lawsuit. At all times in this lawsuit the defendants have acted in their official capacities under the color of state law.

RESPONSE: Admitted.

9. The named plaintiffs and members of the class they represent are housed on facilities and units where there is physical contact with adult mental patients (some of whom are child molesters or have been otherwise charged with criminal conduct.)

RESPONSE: Admitted.

10. There have been incidents of abuse (sexual or otherwise)of the plaintiffs, and the class they represent,

by psychiatric patients in facilities under the control of defendants.

RESPONSE: Denied, admitted that there have been isolated incidents in which plaintiffs have been injured by other patients.

• • •

12. Children and Adolescents should be separated from Adult Mental Patients at all facilities. Segregation of juveniles from adults would be a common practice around the country for child treatment programs.

RESPONSE: Denied.

13. The minimum age a plaintiff should be at State Hospital South (or any other adult facility) would be age seventeen (17) years.

RESPONSE: Denied.

14(a). However, State Hospital South is still forced to admit children below the age of seventeen (17) years.

RESPONSE: Admitted State Hospital South admits minors', denied it is "forced."

14(b). Apparently, State Hospital South used to segregate children from adult mental patients. Combining these two groups is a recent development.

RESPONSE: Denied.

15. The named and class plaintiffs suffer from treatable conditions which can be improved through the provision of appropriate mental health services.

RESPONSE: Denied, admitted as to some, but not all plaintiffs.

16. Most of the named and class plaintiffs suffer from treatable conditions which can be improved through the provision of appropriate mental health services.

RESPONSE: Admitted.

17. The named and class plaintiffs suffer from treatable conditions which can be improved through the provision of appropriate mental health services, including minimally adequate or reasonable training to ensure safety and freedom from undue restraint.

RESPONSE: Denied, admitted as to most plaintiffs.

18. The named and class plaintiffs suffer from treatable conditions which can be improved through the provision of appropriate mental health services provided by qualified and appropriate professionals.

RESPONSE: Denied, admitted as to most plaintiffs.

19. The named and class plaintiffs could live in more appropriate community based settings less restrictive of personal liberty than psychiatric institutions (like State Hospital South) or out of state facilities.

RESPONSE: Denied, admitted as to most plaintiffs.

20. Most of the named and class plaintiffs could live in more appropriate community based settings less restrictive of personal liberty than psychiatric institutions

(like State Hospital South) or out of state facilities if such facilities existed.

RESPONSE: Denied, most plaintiffs do live in community based settings.

21(a). The deposition of George Bachik, pages 60, 63 (lines 11-15) and 74-75 made it clear that "almost all" of the plaintiffs could be placed in the community, and that if there were more money available, the necessity of placing plaintiffs at State Hospital South could be eliminated.

RESPONSE: Admitted.

21(b). Thus, the only reason plaintiffs are held in overly restrictive adult psychiatric hospitals is the lack of less restrictive alternatives in Idaho.

RESPONSE: Denied.

21(c). Mr. Bachik felt that the named plaintiffs could live in community based less restrictive treatment settings in his deposition.

RESPONSE: Denied.

21(d). John M. actually was transferred to a less restrictive setting at the Deveraux Foundation in Victoria, Texas, and Dusty R. (page 119) was also actually transferred to a setting less restrictive of personal liberty in Idaho.

RESPONSE. Admitted, denied that Deveraux is per se less restrictive.

21(e). Mr. James Antram, in his deposition (at pages 37-38), stated that if appropriate less restrictive community based programs existed in Idaho the majority (perhaps 90%) of the placements of plaintiffs at State Hospital South could be eliminated.

RESPONSE: Admitted.

21(f). The defendants' own State Mental Health Program accepts the concept of treatment should take place in the setting least restrictive of personal liberty. *Idaho Mental Health Program,* pages 7 and 9, clearly states that:

> Service should be provided in the least restrictive setting in and which it is possible to facilitate treatment, yet insure the safety of the client and all persons concerned. To the extent possible, disabled persons should be integrated throughout the community rather than segregated in "institutional" settings. In work, education and leisure activities, the mentally ill should participate with the general community.

RESPONSE: Admitted.

21(g). Moreover, the costs of placing a person in a more restrictive, or out of state facility, are higher than treatment in less restrictive community based facilities.

RESPONSE: Denied.

21(h). See *Idaho Mental Health Program,* pages 52-53. "It may be inferred then, that the indirect costs of *not* providing adequate treatment may far exceed the costs of providing such treatment" (Id. at 91). There is however, a higher initial start up (capital) cost.

RESPONSE: Admitted that the document so states.

21(i). Finally, the named and class plaintiffs suffer loss of contacts with family and friends from placement at psychiatric facilities, including State Hospital South. This, in turn, hinders the recovery and placement of plaintiffs and the class they represent.

RESPONSE: Denied, admitted as to most plaintiffs.

22. The named and class plaintiffs' conditions have not significantly improved, or have gotten worse, during their custody by defendants.

RESPONSE: Denied.

23. Some of the named and class plaintiffs' conditions have not significantly improved, or have gotten worse, during their custody by defendants.

RESPONSE: Admitted.

24. Jeff D., Paula E., and John M. still reside in defendants' facilities, though Dusty R. has made enough adjustments to live in a community based treatment facility. The deposition of George Bachik says, at page 91 that Jeff D.'s condition is "about the same" as before, and at page 102 where Paula E.'s condition has "neither improved nor regressed" during her stay at State Hospital South.

RESPONSE: Admitted as to facts when statements were made.

25. The mental health services and programs provided to John M. and the sub-class of plaintiffs placed

outside the State of Idaho is superior to, and more appropriate to the needs of the individual, than those programs provided to the named and class plaintiffs in the State of Idaho.

RESPONSE: Admitted as to those plaintiffs placed out of state for treatment reasons, denied as to most plaintiffs.

26. The deposition of George Bachik on pages 13 (line 3), 22 (lines 17-20), 113, and page 15 (lines 13-23) described these out of state facilities as follows:

> (They are) fairly well specialized for adolescent treatment, and somewhat non-restrictive (in) environment.
>
> I think as far as the compliance with Public Law 94-142, I think they have pretty good schools as a rule, and I think they have the necessary child psychiatrists and child psychologists for implementing a children's program.

The deposition of James Antram reflects that of Mr. Bachik on this point. See pages 47-49, and specifically page 48 (lines 15-25) where he says:

> "Some do quite a good job, others do not. Principally, the contrasting difference would be that the program and services offered in the out of state facilities would be specific to children in that they would offer an organized program, organized service effort, that is generally geared specifically to the child. That's the major variance between what would be offered at those facilities and what would be offered (inside Idaho)."

RESPONSE: Admitted, denied any inference that any placement is appropriate for all plaintiffs, or that the out of state facilities referenced are appropriate for all plaintiffs.

27. However, the geographical isolation of the named and class plaintiffs outside the State of Idaho causes a loss of contact with family and others in Idaho, which in turn causes plaintiffs emotional difficulty and hinders the treatment and recovery of these plaintiffs. This isolation also makes it difficult for defendants to monitor the progress and conditions of these youths.

RESPONSE: Denied, admitted as to most plaintiffs.

28. The only reason class plaintiffs are sent out of state is the lack of an appropriate institution inside the State of Idaho to serve the needs of the plaintiffs.

RESPONSE: Admitted as to plaintiffs placed for treatment reasons.

29. The *Idaho Mental Health Program,* page 81, states:

> These children . . . are referred to out of state facilities. This procedure conflicts with the philosophy that treatment should be provided as close as possible to the client's community and family. About 50 children each year are sent out of state at a cost of excess of $600,000.00 per year.

Obviously, in the words of the Department, "If appropriate programs were available, these funds could have remained instate to benefit Idaho's economy, and the children and their families would have benefited from placement closer to home."

RESPONSE: Admitted as to facts in 1979.

30. Plaintiff youth do improve in these out of state facilities, which causes them to return to Idaho.

RESPONSE: Denied, plaintiff's return for a variety of reasons including availability to local resources.

31. Therefore, the named and class plaintiffs should be provided programs inside the State of Idaho similar to those provided by defendants to class plaintiffs outside the State of Idaho.

RESPONSE: Denied.

• • •

39(a). Some of the named and class plaintiffs are placed at Youth Services Center. About 25 percent of those so placed had learning disabilities but the Youth Services Center has no special program for youths with learning disabilities, as specified in education statutes, and the educational program at Youth Services Center is not accredited by the State Board of Education.

RESPONSE: Denied.

39(b). Also, about 76% of the children placed at Youth Services Center suffer from drug and alcohol problems and/or serious emotional disturbances.

RESPONSE. Admitted.

39(c). Yet the Youth Services Center is not adequately staffed nor programmed to deal with such youngsters.

RESPONSE: Denied.

40(a). There are no licensed specialists in child psychology or child psychiatry for the plaintiffs in the defendants' employment in Idaho.

RESPONSE: Denied, admitted as to State Hospital South.

40(b). As to the lack of staff to treat juveniles at State Hospital South, the deposition of George Bachik, page 29, lines 3-7, make it clear that he does not have any staff that are currently experienced or qualified to provide specialized juvenile treatment and services.

RESPONSE: Admitted.

41(a). The deposition of George Bachik, Administrative Director at State Hospital South, speaks rather directly on the subject of the lack of specialized juvenile psychiatric services at State Hospital South. In this deposition, page 11, lines 5-18, Mr. Bachik admitted that "We don't have programs designed exclusively for juveniles."

RESPONSE: Admitted.

41(b). Thus, there are no purely psychological services for juveniles at this time in Idaho.

RESPONSE: Denied.

42(a). George Bachik made it clear in his deposition that State Hospital South is primarily an adult hospital which makes no special effort to treat juveniles. State Hospital South offers no special programs for those under age eighteen at all.

RESPONSE: Admitted.

42(b). In his deposition Mr. Bachik stated that there are no criteria for admission of youth to State Hospital

South and that the only reason State Hospital South admits plaintiff youth is that there is no other place for them to go.

RESPONSE: Denied.

43. Thus, State Hospital South is used when inappropriate (see Bachik deposition, pages 20 and 77). In fact, all the named plaintiffs were inappropriately placed at State Hospital South at one time for the reason that there was no other appropriate facility in Idaho.

RESPONSE: Denied.

44(a). The defendants own *Idaho Mental Health Program* states, on page 41, that: "The need for an in state residential treatment facility for (emotionally disturbed) children has been clearly documented." "The most evident gap in children's mental health services in the absence of an in state residential treatment facility for severely emotionally disturbed children" (Id. at 82). And further, "children's services lack continuity and comprehensiveness" (Id. at 41). Since "34% of persons in need of mental health services are young people (ages 0-17)" the gravity of this problem is readily apparent (Id. at 42). Clearly, Idaho presently lacks, but needs, sufficient in-patient treatment facilities for emotionally disturbed youth. See deposition of James Antram, pages 39-46.

RESPONSE: Admitted as to facts in 1979.

* * *

45. The reason the psychological conditions of named and class plaintiffs have not significantly improved, or have deteriorated, is the lack of a sound, coordinated sys-

tem of appropriate mental health services delivered in the setting least restrictive of personal liberty with the goal of providing the plaintiffs an opportunity to develop their full potential.

RESPONSE: Denied.

46. The records of Jeff D., a named plaintiff who has been placed at Youth Services Center and State Hospital South, on October 22, 1981, in a "Progress Report" which was prepared by defendants, clearly states that:

> *Treatment Observations:* On 7-22-81 Jeff peaked in his number of reports which have shown a steady, erratic decline since. Jeff has been in Sawtooth 43 weeks with only 16 of those weeks above average grades. Jeff is generally non-motivated due to a lack of viable community resources. He has recently (2 weeks) improved his school work and cottage behavior. He is presently on Phase I and will be on Phase II next week.
>
> • • •
>
> *Comments:* Jeff has been here since 11-28-80. During the past 11 months I have seen minimal change in Jeff. He has almost no motivation to change and I feel his needs could best be met in some other type facility. He continues to need structure but also needs to be able to learn some work skills.

RESPONSE: Admitted that the Progress Report contains the statement.

47. A part of this problem can be referred to as "institutionalization" of present and is described by James Antram, on pages 146-147 of his deposition, as follows:

> "I do believe that there is a phenomenon of institutionalization where people, as in any other circumstance, you will adjust to your immediate environ-

ment, and adjustment to that environment may not transfer and generalize well to another environment so that you may have difficulty adjusting in a different environment, and I see that happening in our institutions. They are contrived environments and are not necessarily consistent with the kind of environment that the person may be moved into after their phase of hospitalization, and the longer the person is in the facility, the more apt for that phenomenon to occur."

RESPONSE: Admitted.

48. On September 4, 1980, a hearing was held in the District Court of the Seventh Judicial District of the State of Idaho, In and For the County of Bingham, Magistrate Division, In the Matter of the Hospitalization of Mark Clary, Intervenor herein. At that hearing, Intervenor Clary was found by both (all) expert witnesses (designated examiners) to be not commitable: not likely to injure himself or others and not in need of care at an inpatient psychiatric facility (like State Hospital South). Therefore, the Court ordered that Intervenor Clary:

A. Be released from the care and custody of State Hospital South as soon as possible to less restrictive alternative setting (e.g., intermediate care facility, halfway house, shelter home, etc.)

B. Have an after-care plan prepared by the Idaho State Department of Health and Welfare immediately to facilitate the Conditional release of Petitioner to a less restrictive setting.

C. Have appropriate education provided in a less restrictive setting than State Hospital South, to the end that Mark Clary graduate from high school.

Copies of this Court Order are attached as Appendix B to Intervenor's Complaint on file with this Court. Mark was subsequently released from State Hospital South to the custody of his father, Frank Clary, in the community.

RESPONSE: Admitted, denied that the Court had jurisdiction to enter the full scope of the order.

49. The community placement and services offered in the community to plaintiffs Jeff D. and Mark Clary were and are insufficient, inappropriate and unsatisfactory.

RESPONSE: Denied, Health and Welfare Defendants "placed" neither plaintiff in the community and do not know what services were provided by others.

50. The legal authority under which a juvenile person is committed to the defendants' custody (whether by Youth Rehabilitation Act, Child Protective Act, or Mental Health Act) is irrelevant to the person's need for treatment and training, and the treatment facilities and services that should be provided to the person.

RESPONSE: Admitted as to the need for services, denied as to the duty to provide services.

51. The North Idaho Childrens Home, even if opened and operated fully, cannot serve the needs of all the named and class plaintiffs.

RESPONSE: Admitted.

52. The "administrative policy" by which defendants allegedly prohibit the admission of juveniles to adult psychiatric hospitals:

A. Does not prohibit the placement of *all* children under age eighteen (18) with adults (including child molesters).

B. Was established as a result of this litigation.

C. Has not prevented totally the placement of children under age eighteen (18) with adult mentally ill persons, at State Hospital South and otherwise.

D. Could be changed at any time, in defendants' discretion.

RESPONSE: Admitted, denied as a result of this litigation.

53. There are presently insufficient facilities and services for the care, treatment and training of the plaintiffs and the class they represent.

RESPONSE: Admitted, there will always be a need for additional resources.

54. The plaintiffs' claim under the State Development Disabilities Act (Idaho Code §39-4601, et seq.) has been substituted for a claim under the Federal Development Disabilities Act (42 USC §6010 et seq.), since the Federal D.D. Act has been interpreted to grant few rights. The Federal and State Acts are somewhat similar though different services are mandated under each.

RESPONSE: Denied.

55. The plaintiffs' claim under the State Development Disability Act (Idaho Code §39-4601, et seq.) is purely legal in nature and not dependent on any extraneous set of facts; no motion to amend plaintiffs' complaint is necessary since these issues have been tried by consent

of the parties. This has expressly been done by the third circuit in *Halderman v. Pennhurst,* — F.2d —, 50 L.W. 2539 (February 26, 1982).

RESPONSE: Denied.

56(a). The defendants' own Concise Statement of Material Facts filed with their summary judgment motion states clearly that Jeff D., Paula E., and John M. all suffer from "mild *mental retardation.*" As defendants so aptly point out in their brief, the State D.D. Act applies only to those who are "developmentally disabled" and I.C. §39-4604(2) expressly defines a "developmentally disabled" as "attributable to an impairment, such as *mental retardation . . .*"

RESPONSE: Admitted.

56(b). Defendants' assertion that the State D.D. Act does not apply to plaintiffs is difficult to understand and incorrect.

RESPONSE: Denied.

57(a). The care and treatment of the mentally ill and the mentally retarded is different. However, both groups are entitled to reasonable care and treatment.

RESPONSE: Admitted.

* * *

58. The well reasoned *Woods v. Idaho State Department of Health and Welfare* decision courageously implemented the Idaho Development Disability statute to protect a helpless mentally disabled Idahoan. This court should do the same in this situation. *Halderman v. Pennhurst,* — F.2d —, 50 L.W. 2540-2541 (2/16/82).

RESPONSE: Denied.

59. There are at least three sub-classes involved in this litigation. These are:

a. Those children plaintiffs who do not receive any specialized or appropriate mental health care, treatment or training in highly restrictive adult psychiatric wards (such as State Hospital South and State Hospital North.)

RESPONSE: Admitted.

b. Those children plaintiffs who receive some specialized or appropriate mental health care, treatment and training; but reside in out of state placement settings, which are restrictive of the contacts and personal liberty in Idaho.

RESPONSE: Denied on the basis that Health and Welfare Defendants are unable to identify the group involved.

c. Those children plaintiffs who receive some specialized or appropriate mental health care, treatment and training in community based treatment facilities in Idaho.

RESPONSE: Admitted.

60. The actions alleged in admission number 59 exclude and deny plaintiffs programs solely on the basis of their handicap. As such, the defendants have violated the provisions of 29 USC §794.

RESPONSE: Denied.

61. The named and class plaintiffs have the right to reasonably safe conditions of confinement, freedom from unreasonable bodily restraint, and minimally adequate or

reasonable training by qualified professionals to ensure safety and freedom from undue restraint.

RESPONSE: Admitted, subject to qualifications in *Youngberg v. Romero,* (1982) — U.S. —, 73 L.Ed. 2d 28.

62. The state also has the unquestioned duty to provide reasonable safety for all residents and personnel within the institution. And it may not restrain residents except when and to the extent professional judgment deems this necessary to assure such safety or to provide needed training. In this case, therefore, the state is under a duty to provide respondent with such training as an appropriate professional would consider reasonable to ensure his safety and to facilitate his ability to function free from bodily restraints. It may well be unreasonable not to provide training when training could significantly reduce the need for restraint or the likelihood of violence.

RESPONSE: Admitted that is a correct statement of part of the decision in *Youngberg.*

63. The defendants have breached their duty to plaintiffs and have failed to provide reasonably safe conditions of confinement, freedom from unreasonable bodily restraint, and minimally adequate or reasonable training by qualified professionals to ensure safety and freedom from undue restraint.

RESPONSE: Denied.

64. The named plaintiffs and class they represent have property and liberty interests, secured under state and federal law, to a sound, coordinated system of appropriate mental health services delivered in the least restrictive environment appropriate to their needs, and

with the goal of providing these plaintiffs with an opportunity to develop their full potential.

RESPONSE: Admitted to the extent of available resources, facilities and services.

65. The defendants have failed to provide to plaintiffs a sound, coordinated system of appropriate mental health services delivered in the least restrictive environment appropriate to plaintiffs needs, and with the goal of providing these plaintiffs with an opportunity to develop their full potential. There have, in fact, been cases of physical, sexual and other abuse of the plaintiff class.

RESPONSE: Denied.

* * *

DATED this 7th day of October, 1982.

/s/ James Wickham
Deputy Attorney General
Attorney for
Health and Welfare Defendants

(Certificate or Affidavit of Service Omitted in Printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Case No. Civ. 80-4091

JEFF D., PAULA E., JOHN M., and DUSTY R., minors individually and on behalf of the class they represent, by and through their next friend, Charles Johnson, and Mark Clary, Intervenor,

Plaintiffs,

v.

JOHN V. EVANS, THOMAS L. PURCE, JERRY EVANS, GEORGE BACHIK and CARROLL ELMORE, individually and in their official capacities as employees and agents of the Idaho State Department of Health and Welfare,

Their Successors in Offices, Titles and Interests,

Defendants.

AMENDED ANSWER

(Filed November 1, 1982)

I.

Defendants John V. Evans, Thomas L. Purce, George Bachik and Carroll Elmore, respond to the Class Action Complaint for Declaratory and Injunctive Relief as follows:

1. Said Defendants deny each and every allegation, together with each and every inference and conclusion derived therefrom, not specifically admitted herein.

2. Said Defendants admit the allegations contained in paragraphs 8, 9, 10, 11, 12, 13, 16, 38, 43, 50, 59, 60, 61, 62, 63, 64, 66, 67, 69, 75, 76, 83, 85, 89 and 90.

3. Said Defendants admit the allegations contained in paragraphs 4, 5, 6, 7, 17, 18, 22, 23, 28 and 30 as to facts existing when the Complaint was filed.

4. In response to paragraph 27, said Defendants admit, as to facts existing when the Complaint was filed that Plaintiff John M. is a fifteen year old boy who has been diagnosed as a child with emotional problems, possible mental retardation, has experienced problems caused by anti-social behavior, and has been placed in special education classes and community residential programs.

5. In response to paragraph 31, said Defendants admit that Plaintiff Dusty R. was admitted to State Hospital South in Blackfoot, Bingham County, State of Idaho, in May, 1980.

6. In response to paragraph 36, said Defendants admit that most plaintiffs suffer from treatable conditions which could be improved by appropriate treatment and educaton; said Defendants allege that the ameniability to treatment must be assessed on an individual basis in light of available services.

7. In response to paragraph 39, said Defendants admit that some plaintiffs are or will be placed in facilities in Idaho under contract to the Idaho Department of Health and Welfare.

8. In response to paragraph 40, said Defendants admit that some plaintiffs will be placed in State Hospital South in Blackfoot, Bingham County, State of Idaho, and will come into contact with those being treated as criminal offenders (i.e. those who are being evaluated, unfit to stand trial or have been acquitted of a crime on grounds

of mental disease or defect under Idaho Code, Sections 18-211, 18-212 or 18-214, respectively.)

9. In response to paragraph 48, said Defendants admit that the named Plaintiffs and the class they seek to represent have property and liberty interests, secured under state and federal law to a sound, coordinated system of appropriate mental health services delivered in the least restrictive environment appropriate to their needs, and with the goal of providing these Plaintiffs with an opportunity to develop their full potential; however, said Defendants allege that "soundness" and "coordination" vary with each state or federal law granting any such right and that "appropriateness" "restrictiveness" and "full potential" must be determined on a case-by-case basis; further, said Defendants deny that any such rights or interests impose a duty other than to provide services in available facilities by available staff within the scope of the staff's authorized practice and within available resources.

10. In response to paragraph 70, said Defendants admit that under the Developmental Disabilities Assistance and Bill of Rights Act, "developmental disability" means a disability of a person which is attributable to mental retardation or any other condition of a person found to be closely related to mental retardation because such condition results in similar impairment of general intellectual functioning or adaptive behavior to that of mentally retarded persons or requires treatment and services similar to those required for such persons.

11. In response to paragraph 72, said Defendants admit to said allegations but deny any duty other than to

provide services in available facilities by available staff within the scope of staff's authorized practice and within available resources.

12. In response to the allegations contained in paragraphs 77, 78 and 79, said Defendants generally admit said allegations but deny that the Act creates any rights in Plaintiffs and that Defendants have violated any of the Act's requirements and allege that the Act has been repealed.

II.

Defendants John V. Evans, Thomas L. Purce, George Bachik and Carroll Elmore respond to Intervenors' Complaint as follows:

1. Said Defendants incorporate the reference their foregoing Amended Answer and their Intervenor's Complaint dated February 2, 1981.

III.

Defendants John V. Evans, Thomas L. Purce, George Bachik and Carroll Elmore move to dismiss the Complaint for failure to state a claim upon which relief can be granted and for lack of jurisdiction pursuant to the Eleventh Amendment of the United States Constitution.

WHEREFORE Defendants pray that Plaintiffs take nothing by way of their Complaints, that Defendants be awarded their costs and attorney's fees incurred herein, and for such other relief as the Court deems proper.

DATED this 27th day of October, 1982.

/s/ James Wickham
Deputy Attorney General
Attorney for
Health and Welfare
Defendants

/s/ Thomas C. Frost
Deputy Attorney General
Attorney for John V. Evans

(Certificate or Affidavit of Service Omitted in Printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

(Title omitted in printing)

MOTION FOR CONSIDERATION OF COSTS AND ATTORNEY FEES ON SETTLEMENT

(Filed April 4, 1983)

The plaintiff class, by and through their attorney of record, hereby moves the above entitled court to allow consideration of costs and attorney fees in the settlement of this matter.

This motion is based on the pleadings, discovery and other documents on file in this matter. This motion is further based on the Stipulation settling mental health claims and Order on file in this matter, and the oral stipulations submitted at the Pre-Trial Hearing in this matter held on March 22, 1983.

WHEREFORE, plaintiffs move that the above entitled court:

(1) Approve the agreed upon settlement in this matter except for the provision on costs and attorney fees; and

(2) Allow plaintiffs to present a cost bill (with attorney fees) for consideration by the court.

DATED this 31st day of March, 1983.

/s/ Charles Johnson, III
JOHNSON AND OLSON,
CHARTERED
303 Spaulding Building
Pocatello, Idaho 83204

(Certificate or Affidavit of Service Omitted in Printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

(Title omitted in printing)

Reporter's Transcript of Proceedings held in the above-entitled action before the HONORABLE MARION J. CALLISTER, United States District Judge, District of Idaho, sitting without a jury commencing at 1:30 p.m., on Thursday, April 28, 1983, at Pocatello, Idaho.

APPEARANCES

For Plaintiffs:	For Defendants:
L. CHARLES JOHNSON, III Post Office Box 1725 Pocatello, Idaho 83204	JAMES WICKHAM Deputy Attorney General 450 West State, 7th Floor Boise, Idaho 83720

POCATELLO, IDAHO,
THURSDAY, APRIL 28, 1983, 1:30 P.M.

THE CLERK: Cause No. Civil 80-4091, Jeff D., et al., versus John V. Evans, et al., for hearing.

THE COURT: Counsel, I have considered your briefs. I will hear your argument.

You may proceed.

MR. JOHNSON: Thank you, Your Honor. If it may please the Court, this matter came up for a pretrial conference on March 22nd of last month.

At that time the State of Idaho tendered a settlement proposal which for the first time proposed that all emotionally disturbed children under age 14 be segregated from all adult mental patients, and from age 14 to 18 they could only be kept with adult mental patients for a period of up to 45 days while a substitute facility was found,

with one 45-day extension allowed in cases where a prior placement had proved to be unsuccessful.

Furthermore, all these children from 14 to 18 ought to be segregated from all people with a history of being child molesters.

At that time the plaintiff class, on behalf of myself, accepted that proposal, since it was substantially the relief we had asked for in the complaint. However, at that time I was under direct instructions from my employer on contract, Idaho Legal Aid Services, not to negotiate attorney's fees. At that time, then, I conditioned the settlement on court approval of the attorney's fees waiver.

I have, subsequent to that time, a week later pursuant to court instruction for further briefing, made a motion for approval of this settlement as it was outlined by the state and myself and the plaintiff class, and further for an award of costs, including attorney's fees, pursuant to the attorney's fees statute, 28 USC Section 1988.

The attorney's fees statute, as His Honor is aware, was passed in order to provide access to justice for individuals without financial means who hire an attorney to protect their rights. I think the brief that I have written that has been considered by the Court speaks for itself on the reasons this statute was enacted.

I think also the Federal District Court of Massachusetts in Brewster versus Dukakis, which is cited in my brief, came to the conclusion that these awards of attorney's fees were necessary in order to provide an advocacy system for people such as the plaintiffs in this class who were subject to incarceration by the state. In that case

the Court made an award of attorney's fees in order to set up such an advocacy system.

Although it's not in my brief, it's a matter of record that I have since left the employment of Idaho Legal Aid on a full-time basis. I am employed by them on a part-time basis and I am in private practice the rest of the time, primarily because of funding cuts and other restrictions in the Legal Aid Act.

Because of these funding cuts, the access to justice for these individuals is less than it was 18 months ago.

On the ethical question, I think that the case of Mendoza versus United States, which is a Ninth Circuit case in 1980, is most directly to the point on this issue, and the Court, as I'm sure, has read my brief on this issue, but the Court said that specifically that they don't believe that the potential conflict between a person's clients, an attorney's clients, and the attorney's vested interest disappears simply because there are no funds or money damages being negotiated.

In other words, an attorney like myself can be put in the position of either negotiating for his client or negotiating for his attorney's fees, and I think that that is pretty much the situation that occurred in this instance.

I was forced, because of what I perceived to be a result favorable to the plaintiff class, a result that I didn't want to see jeopardized by a trial or by any other possible problems that might have occurred. And the result is the best result I could have gotten in this court or any other court and it is really a fair and just result in any instance and what should have occurred years earlier and

which in fact should have been the case all along. That result I didn't want to see disturbed on the basis that my attorney's fees would cause a problem and cause that result to be jeopardized.

Therefore, I presented the settlement to the court at that time because it is at just and fair settlement to the plaintiffs and left the attorney's fees and costs to be determined at a later date, and I have submitted that to the Court now in this motion, and under Rule 23(c)[(e)] of the Federal Rules of Civil Procedure, the Court may, of course, accept the settlement or a part thereof, and since the attorney's fees in that settlement were specifically left for further discussion by the Court, I would submit that the Court has the power under Rule 23(c)[(e)] clearly to approve the settlement and to allow Idaho Legal Aid Services to present a cost bill which would include attorney's fees for consideration by the Court, and then if the Court so desired, to strike what portions of that cost or attorney's fees bill it deemed appropriate under the circumstances.

What we are really asking for, Your Honor, is a chance merely to submit the cost bill for the Court's consideration.

On Page 4 of the state's brief it states that instead that the agreement negotiated, "is simply an agreement of both parties to waive their right to attorney's fees," and we specifically tried to make it clear that I wasn't trying to waive any rights to attorney's fees, but instead to leave that for the Court to consider at a later date.

And that's really all we are asking for, is under Federal Rule of Civil Procedure 23(c)[(e)] a chance to sub-

mit those attorney's fees for consideration by the Court, but in any case, on behalf of the plaintiff class, I would like to request that that stipulation become the order of the Court and that we be allowed to submit our attorney's fees if the Court deems it appropriate.

Thank you.

THE COURT: Do you wish to reply, Mr. Wickham?

MR. WICKHAM: As the Court will recall, the last time we met the parties tendered a stipulation settling the remaining issues to the Court for its consideration, and as you are aware, it contains a provision that the parties will bear their attorney's fees incurred.

We stipulated at that time that the tender of settlement was conditioned on approval of the Court of that item, and further that the Court would be guided in deciding to approve the settlement on whether it was ethical or unethical to bargain away a claim for attorney's fees.

I believe the recent Ninth Circuit cases that are referred to in my brief clearly enunciate the standard that the Court can use in deciding to approve the settlement, namely whether it was taken as a whole and a fair and reasonable resolution of the matter.

I have also presented to the Court authorities suggesting that it was not unethical to bargain the issue of attorney's fees, and on the basis of those and the agreement stated in my brief, I would ask the Court to approve the tendered settlement.

THE COURT: Well, I have already given this matter some thought, and I am just going to rule from the bench.

As I look at the cases that are there, the ethical consideration is "Is the attorney in the process of bargaining out to depreciate his client's claim or to proceed in a manner that will be unfair to his client?" And I think the ethical considerations run only to the issue and not to the issue of what is fair to the attorney, and therefore I am of the opinion that it doesn't violate any ethical considerations for an attorney to give up his attorney fees in the interest of getting a better bargain for his client.

The last time when we were considering this — I know attorneys can't be expected to do that very often and it's comforting to find an attorney that will do that sometimes occasionally — but when we discussed this, as I got the viewpoint, the state was not willing to concede that they were obligated to do the things that they were doing and that they were being required to do them by this action, but they were willing to do them as long as their costs were outlined and they didn't face additional costs, but they indicated that they only submitted upon the stipulation that there would be no attorney's fees paid.

My viewpoint is that they are in a position to say, if I say attorney's fees will be allowed, to withdraw the stipulation and put us to trial, and I think, considering all of the factors and all that has been accomplished and the fact that the negotiation has been made on that basis that the clients have been treated very fairly and there

has been no unethical conduct on the part of the parties, that I'm going to approve the settlement without attorney's fees and costs.

Thank you both, gentlemen. I will sign the stipulated order today.

MR. WICKHAM: Will the parties be receiving a copy of the executed order?

THE COURT: I don't know whether you submitted any to be sent out or not.

MR. JOHNSON: We submitted only one copy at the time of the settlement, Your Honor. I have an extra copy.

THE COURT: I can have the clerk make copies. If you have copies, it would be very helpful, because he could stamp those and you could have them.

Do each of you have a copy?

MR. WICKHAM: Yes.

THE COURT: I have signed this, and if you want to leave those with the clerk, he will stamp those and return them to you.

Thank you, gentlemen.

(The proceedings in this matter were concluded at 2:00 p.m. this date.)

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(Reporter's Certificate Omitted in Printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Case No. CIV 80-4091

JEFF D., PAULA E., JOHN M., and DUSTY R., minors individually and on behalf of the class they represent, by and through their next friend, Charles Johnson, and MARK CLARY, Intervenor,

Plaintiffs,

vs.

JOHN V. EVANS, THOMAS L. PURCE, JERRY EVANS, GEORGE BACHIK and CARROLL ELMORE, individually and in their official capacities as employees and agents of the Idaho State Department of Health and Welfare,

Their Successors in Offices, Titles and Interests,

Defendants.

STIPULATION SETTLING MENTAL HEALTH CLAIMS and ORDER

(Filed April 28, 1983)

Plaintiffs and Defendants John V. Evans, Thomas L. Purce, George Bachik and Carroll Elmore (hereinafter: "defendants"), through their respective counsel of record, hereby stipulate to settle the remaining mental health claims upon the following terms:

I

Plaintiffs have the right to a sound, coordinated system of appropriate mental health services delivered in the least restrictive environment appropriate to their

needs, with the goal of providing them the opportunity to develop their full potential.

Defendants have the duty, so far as possible, through procedures, agreements, contracts and policies, of ensuring an available, accessible continuum of alternative community-based treatment facilities and residential programs providing mental health services to plaintiffs in the setting least restrictive of personal liberty on a statewide basis.

II

To achieve the goals of Division I, above, defendants shall:

1. Undertake on an annual basis a program of planning for the service programs administered by the Division of Community Rehabilitation of the Idaho Department of Health and Welfare, including Community Mental Health, Adult and Child Development and Institutional programs. Each individual planning effort shall be coordinated with the others and shall assess the needs of plaintiffs within each program, identify services and facilities which need to be developed or modified to address such needs, and establish an implementation plan of priorities and resources available or required to satisfy such needs. A copy of all such plans shall be submitted to counsel for plaintiffs.

2. With all deliberate speed, seek to establish such facilities and programs identified as necessary and appropriate under Paragraph II(1) for the provision of mental health services to plaintiffs in the most normal living conditions in Idaho.

3. The organizational unit(s) of the Idaho Department of Health and Welfare having programmatic responsibility for services to plaintiff's shall annually submit a legislative budget request for funds for the operation of community-based treatment facilities and residential programs and the development of such additional facilities and programs identified as necessary and appropriate under Paragraph II(1) to serve the needs of plaintiffs. Until such time as other private or governmental agencies develop and operate community facilities and programs sufficient to meet the needs of plaintiffs identified under Paragraph II(1), defendants shall accept responsibility for the development and operation, within the limits of resources of or available to defendants, either directly or in conjunction with other providers, of such facilities and programs.

4. Defendants shall prohibit the admission of plaintiffs to any psychiatric treatment unit of the Idaho Department of Health and Welfare where there is contact as to living and sleeping arrangements with adult mental patients, provided that plaintiffs in the following circumstances may be so admitted (subject to the protections in Paragraph II(5)):

4a. Judicial proceedings for the involuntary commitment of a plaintiff have been commenced under Section 66-329, Idaho Code, and (i) the court in such proceedings enters an order for temporary detention under Section 66-329(e), Idaho Code, (ii) the court in such proceedings determines that admission to such a facility is necessary for the protection of the plaintiff, (iii) no less restrictive alternate facility is available to the court or

appropriate under the circumstances, and (iv) the admission under this exception does not extend past the time the plaintiff is dispositioned to an appropriate treatment facility or dismissal of the proceedings; or

4b. Jurisdiction under the Youth Rehabilitation Act has been waived pursuant to Sections 16-1806 or 16-1806A, Idaho Code, the plaintiff has been charged with a criminal offense and proceeded against as an adult, and is committed pursuant to Section 18-211 or 18-212, Idaho Code; or

4c. The plaintiff suffers from a mental disorder which, in the opinion of a psychiatrist, is amendable to treatment at such facility, such facility is closer to the plaintiff's home than another appropriate, available facility, and such admission does not extend for more than forty-five (45) days; or

4d. The plaintiff has been committed pursuant to Section 66-329, Idaho Code, has a history of placements in more than one residential facility with a program of services designed for children or adolescents and such placement has not benefited the the plaintiff or no other appropriate facility is available and such admission does not extend for more than forty-five (45) days, provided that such admission may continue for one (1) additional forty-five (45) day period for the purpose of placement in an alternate facility; or

4e. The Idaho Department of Health and Welfare develops a psychiatric treatment unit for plaintiffs in which plaintiffs are separated from adult mental patients with respect to living and sleeping arrangements.

5. The exceptions of Paragraph II(4) notwithstanding, (i) no plaintiffs under the age of fourteen (14) years may be admitted under exceptions II(4)(a), (b), (c) or (d) to any such facility; and (ii) nor may any plaintiff be placed on a unit with an adult mental patient with a history of sexual activity as an adult with a minor.

6. The Idaho Department of Health and Welfare shall organize and utilize an interdisciplinary intra-agency committee composed of representatives of its mental health, developmental disabilities, social services and field operations programs to review the proposed admission of plaintiffs to any psychiatric treatment until of said Department where there is contact with respect to living and sleeping arrangements with adult mental patients under exception II(4)(d). The committee shall review the proposed admission, alternative placements, the plaintiff's need for inpatient care and determine that such admission is the most appropriate available placement for such plaintiff.

7. The Administrative Director of any psychiatric treatment unit of the Idaho Department of Health and Welfare in which there is contact with respect to living and sleeping arrangements with adult mental patients shall notify counsel for plaintiffs or his successor as reflected in the records of the above-entitled action of the admission of each plaintiff under exceptions II(4)(a), (c), or (d) and extension of any admission under II(4)(d). The notification shall include the plaintiff's name and date of birth, the name and address of the plaintiff's parent(s), guardian(s) or other person(s) acting in loco parentis, other facilities considered prior to such admis-

sion and the name and address of the official to contact concerning the admission.

8. All placements of plaintiffs shall be in the environment least restrictive of personal liberty in which appropriate services can be provided with a perference for (i) placement in the plaintiff's home and (ii) placement in a psychiatic treatment unit in which there is contact with respect to living and sleeping arrangements with adult mental patients only after all other appropriate placements have been attempted or considered and rejected.

9. The defendants shall provide plaintiffs with appropriately prescribed mental health services according to each plaintiff's individual treatment plan, including, where appropriate, diagnosis, evalution, therapy and counselling. Service and decisions concerning services shall be provided or made by professions qualified by education, training or experience to make the particular decision or provide the particular service involved. Treatment decisions concerning plaintiffs admitted to a psychiatric treatment unit of the Idaho Department of Health and Welfare must be made by professionals experienced in providing such services or making such decisions in the psychiatric setting; provided that day-to-day decisions regarding the care of such plaintiffs—including decisions that must be made without delay—may be made by other persons if such other persons are subject to the direct supervision of a qualified professional and each such decision is reviewed by a qualified professional.

10. For each plaintiff, defendants shall develop an individualized treatment or service plan, which, in the

case of plaintiffs admitted to an inpatient psychiatric treatment unit, shall meet the requirements of "Rules Governing Hospitals", Title 2, Chapter 1, Rules and Regulations of the Department of Health and Welfare.

11. Defendants shall provide adequate psychiatric, psychological or other counseling and programming, as considered appropriate in light of each plaintiff's individual treatment plan, including at least five (5) hours of therapy or other direct services per week.

12. In developing and implementing the individual treatment plans, defendants shall include the least possible reliance on medications appropriate under the circumstances.

13. The Administrative Directors of each psychiatric treatment unit of the Idaho Department of Health and Welfare shall keep records containing a description of any extraordinary incidents (including sexual incident, physical attacks, threats or accident) in such facility involving any plaintiff. Each report must be prepared by a staff member noting personal knowledge of the incident or other source of information. The Administrative Director shall investigate each report. Modifications to the individual treatment plan of each plaintiff involved in each such report must be considered following verification of a report.

14. Upon verification of an incident report, the Administrative Director of each psychiatric treatment unit of the Idaho Department of Health and Welfare shall take the necessary steps to protect such plaintiff from recurrence of such incident.

15. With respect to plaintiffs admitted to an inpatient psychiatric treatment unit, other than one of the Idaho Department of Health and Welfare, in which there is contact with respect to living and sleeping arrangements with adult mental patients, an employee of such department shall be responsible for the monitoring of the care and progress of each such plaintiff. In preparing reports regarding such plaintiff, either pursuant to Paragraph II(20) below or Section 66-337, Idaho Code, such employee shall review all extraordinary incidents (including sexual incidents, physical attacks, threats or accidents) involving the plaintiff, include a description of any such incident in such report, consider modifications to the plaintiff's treatment or service plan or a change in placement as may be necessary to protect such plaintiff from recurrence of such incident.

16. The individual treatment plan of each plaintiff admitted to a psychiatric unit of the Idaho Department of Health and Welfare shall be developed upon admission and reviewed as needed but at least once every six (6) months or upon verification of an incident report. The review shall be conducted either by the facility's quality assurance committee, which committee must include at least one (1) qualified professional with at least two (2) years' clinical experience in the treatment of children or adolescents, or by an interdisciplinary committee appointed by and reporting to the Administrative Director, the members of which committee must have at least two (2) years' clinical experience in the treatment of children or adolescents.

17. In the event any plaintiff admitted under the exceptions contained in Paragraph II(4) has exhausted

the programs and treatment resources available through the Idaho Department of Health and Welfare and such plaintiff's clinical condition does not improve or deteriorates in any six (6) month period, the Administrative Director of the facility shall refer such plaintiff to a licensed psychologist or psychiatrist specializing in children's or adolescent's treatment or such other professional specializing in an area appropriate to such plaintiff's condition for additional case consultation.

18. Each individual treatment or service plan contain a placement assessment. The placement assessment must identify the least restrictive environment most capable of meeting the needs and capabilities of such plaintiff. If the plaintiff is not placed in such environment, the plan must reflect why the plaintiff was not so placed.

19. Each individual treatment plan of a plaintiff admitted to an inpatient treatment facility must include a discharge plan. The discharge plan must include a projected date for the transfer, release or discharge from such facility and the programming necessary to achieve such result.

20. The parent(s), guardian(s) or other person(s) acting in loco parentis of each plaintiff must be notified on at least a semi-annual basis of their plaintiff's vocational, social, living skills, progress and clinical condition.

21. State Hospital North, State Hospital South, and any other inpatient psychiatric treatment unit of the Idaho Department of Health and Welfare shall establish in consultation with plaintiffs' counsel (see below) and implement a patient grievance procedure. Such procedure shall be available to each plaintiff and his or her

parent(s), guardian(s) or other person(s) acting in loco parentis, and provide a method for the plaintiff or such other person to disagree with the individual treatment plan or its implementation.

22. Each plaintiff's individual treatment plan must be separate from and coordinated with such plaintiff's individual education plan.

23. At least once each year so long as the court retains jurisdiction of this matter, counsel for plaintiffs, counsel for defendants and the Administrator of the Division of Community Rehabilitation of the Idaho Department of Health and Welfare shall meet and confer concerning defendants' implementation of this Stipulation and any other items of concern to plaintiffs.

24. The court may retain jurisdiction over this matter for five (5) years or until satisfied by stipulation or otherwise that the claims for relief as alleged in the Complaint herein have been adequately addressed.

25. Plaintiffs and defendants shall each bear their own costs and attorney's fees thus far incurred, if so approved by the Court.

26. This Stipulation may be merged into a judgment of the court fully resolving the above-entitled action.

DATED this — day of March, 1983.

/s/ James Wickham
Deputy Attorney General
Attorney for Health and
Welfare Defendants

Welfare

DATED this — day of March, 1983.

/s/ Thomas C. Frost
Deputy Attorney General
Attorney for Defendant
John V. Evans

DATED this — day of March, 1983.

/s/ L. Charles Johnson, III
Attorney for Plaintiffs

ORDER

IT IS SO ORDERED.

/s/ Marion J. Callister
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Civil No. 80-4091

JEFF D., PAULA E., JOHN M., and DUSTY R., minors individually and on behalf of the class they represent, by and through their next friend, Charles Johnson, and Mark Clary, Intervenor,

Plaintiffs,

vs.

JOHN V. EVANS, THOMAS L. PURCE, JERRY EVANS, GEORGE BACHIK and CARROLL ELMORE, individually and in their official capacities as employees and agents of the Idaho State Department of Health and Welfare,

Their Successors in Offices, Titles and Interests,

Defendants.

ORDER DENYING ALL COSTS

(Filed May 9, 1983)

The above-entitled matter came on for hearing on April 28, 1983, in Pocatello, Idaho, on plaintiffs' motion for consideration of costs and attorney fees on settlement in the above-entitled action. This action was settled by a stipulation, settling mental health claims, which was approved by (and became the order of) this Court on April 28, 1983. The stipulation provided that each party "shall bear their own costs and attorney fees thus far incurred, if so approved by the Court."

For good cause shown, and based on the Stipulation Settling Mental Health Claims, and other pleadings, docu-

ments and papers on file in this matter, and for the further reasons stated at the hearing on the motion for attorneys fees, IT IS ORDERED that the plaintiffs' motion for consideration of costs and attorney fees on settlement be, and the same is hereby, DENIED.

DATED this 6th day of May, 1983.

/s/ Marion J. Callister, Chief Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Case No. CIV 80-4091

(Title omitted in printing)

NOTICE OF APPEAL

(Filed May 26, 1983)

NOTICE IS HEREBY GIVEN that plaintiffs above named hereby appeal to the United States Court of Appeals for the Ninth Circuit from the "Order Denying All Costs" in this action dated May 6, 1983.

/s/ Charles Johnson, III
JOHNSON AND OLSON,
CHARTERED
303 Spaulding Building
Pocatello, Idaho 83204
Lawyer for Plaintiff

(Certificate or Affidavit of Service Omitted in Printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Case No. Civ. 80-4091

(Title omitted in printing)

MOTION TO SUSPEND PERFORMANCE OF STIPULATION PENDING APPEAL

(Filed June 3, 1983)

Health and Welare Defendants move for an order suspending their duties under the Stipulation Settling Mental Health Claims and Order entered April 28, 1983 on the grounds:

1. On or about March 22, 1982, said Defendants conditionally tendered said Stipulation, such Stipulation being that the parties would bear their own costs and attorney's fees thus far incurred.

2. Upon tendering said Stipulation, the parties further stipulated in open court that the Court was to resolve the issue whether it is ethical for the parties to negotiate the issue of attorney's fees and costs concurrently with negotiations on the merits and further stipulated that should the Court conclude such bargaining was ethical that said Stipulation would be tendered as submitted (with the waiver provision).

3. Thereafter, following briefs and argument, on April 28, 1983, the Court held that it was ethical for the parties to concurrently negotiate the merits and attorney's fees, and that the tendered Stipulation was fair and equitable.

4. Pursuant to the Stipulation, on May 6, 1983, the court entered an order denying plaintiff's costs and attorney's fees.

5. On or about May 26, 1983, plaintiffs' filed a Notice of Appeal regarding the denial of attorney's fees and costs.

6. Said appeal has the effect of revoking plaintiff's tender of the Stipulation Settling Mental Health Claims and Order.

7. Said appeal should estop plaintiffs' from enforcing the Stipulation Settling Mental Health Claims and Order during the pendency of the appeal.

8. Health and Welfare Defendants' duties under the Stipulation Settling Mental Health Claims and Order should be suspended during the pendency of the appeal.

WHEREFORE Health and Welfare Defendants pray for an order suspending performance of their duties under the Stipulation Settling Mental Health Claims and Order while the appeal is pending.

DATED this 31st day of May, 1983.

/s/ James Wickham
Deputy Attorney General
Attorney for
Health and Welfare Defendants

(Certificate or Affidavit of Service Omitted in Printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Case No. Civ. 80-4091

JEFF D., PAULA E., JOHN M., and DUSTY R., minors individually and on behalf of the class they represent, by and through their next friend, Charles Johnson, and Mark Clary, Intervenor,

Plaintiffs,

vs.

JOHN V. EVANS, THOMAS L. PURCE, JERRY EVANS, GEORGE BACHIK and CARROLL ELMORE, individually and in their oficial capacities as employees and agents of the Idaho State Department of Health and Welfare,

Their Successors in Offices, Titles and Interests,

Defendants.

ORDER

(Filed August 12, 1983)

The parties having stipulated to resolve the remaining mental health claims, having further stipulated that should the Court conclude that it is ethical for attorneys admitted to practice before this Court to negotiate a waiver of attorneys fees and costs concurrently with the merits of the claims that the stipulation would be tendered for consideration by the Court with a waiver provision, and the Court having concluded that the practice is ethical, having approved the settlement stipulation and having denied the plaintiffs' request for attorney's fees and costs and the plaintiffs' having appealed said denial, and

it appearing to the court that suspension of the stipulation pending appeal is necessary to preserve the expectations of the parties while the appeal is pending;

IT IS HEREBY ORDERED that Health and Welfare Defendants' duties under the Stipulation Settling Mental Health Claims and Order entered April 28, 1983 be and the same are hereby suspended while said appeal is pending.

DATED this 10th day of August, 1983.

/s/ Marion J. Callister
District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

(Title omitted in printing)

MOTION FOR RELIEF FROM STAY

(Filed August 29, 1983)

The plaintiff class, by and through their attorney and next friend, hereby moves the above entitled Court for relief from the suspension (stay) of the "Stipulation Settling Mental Health Claims and Order" in the Court's order dated August 10, 1983. This motion is made pursuant to Federal Rule of Civil Procedure 62 and Appellate Rule 8.

The relief from stay requested is that the "Order" dated August 10, 1983, be rescinded and nullified; and that the Stipulation Settling Mental Health Claims and Order entered April 28, 1983, be made final in all respects.

This motion is based on the pleadings, depositions, interrogatories, and other papers on file in this matter, including the motions, briefs, affidavits, factual statements and summary judgment papers on file herein. This motion is also supported by the attached brief.

DATED this 26 day of August, 1983.

/s/ Charles Johnson
JOHNSON AND OLSON,
CHARTERED
303 Spaulding Building
Pocatello, Idaho 83204

(Certificate or Affidavit of Service Omitted in Printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Civil No. 80-4091

JEFF D., PAULA E., JOHN M., and DUSTY R., minors individually and on behalf of the class they represent, by and through their next friend, Charles Johnson, and Mark Clary, Intervenor,

Plaintiffs,

—vs—

JOHN V. EVANS, THOMAS L. PURCE, JERRY EVANS, GEORGE BACHIK and CARROLL ELMORE, individually and in their official capacities as employees and agents of the Idaho State Department of Health and Welfare,

Their Successors in Offices, Titles and Interests,

Defendants.

ORDER

(Filed September 6, 1983)

Plaintiffs having filed a motion for relief from stay, and the Court having reviewed the file and the brief in support of said motion.

NOW, THEREFORE, IT IS ORDERED that the motion for relief of stay be, and the same is hereby, DENIED.

DATED this 6th day of September, 1983.

/s/ Marion J. Calister, Chief Judge
United States District Court

UNITED STATES DISTRICT COURT
District of Idaho
United States Court House
Box 040
550 W. Fort Street
Boise, Idaho 83724

Marion J. Callister
Chief Judge

September 6, 1983

Mr. Charles Johnson, III
Attorney at Law
P. O. Box 1725
Pocatello, Idaho 83204

Re: *Jeff D. et al v. Evans et al, Civil No. 80-4091*

Dear Mr. Johnson:

By way of explanation of my denial of your motion for relief from stay, the defendants' signing of the stipulation was dependent upon the Court's approval of the finding that it was appropriate to accept a stipulation where plaintiffs waived attorneys fees. The Court made that finding and signed the stipulation. You then appealed from this Court's finding. Obviously you are in a "Catch 22" situation. If the circuit court reverses this Court and finds that it is not appropriate, then the stipulation must be set aside as I advised you at the time it was accepted. The defendants entered into the stipulation only as a compromise matter with the understanding that they would not pay any attorneys fees, and advised the Court that if there were going to be attorneys fees that they wanted to proceed with trial because they did not think they were required to conform to the stipulation legally. Under those circumstances, it would be entirely inappropriate to leave the stipulation in effect. If you

effectively challenge the stipulation, the whole stipulation falls and the matter must be tried by the Court. On the other hand, if you do not successfully challenge the stipulation, then the stipulation and stay is in effect. But until the validity of the stipulation is determined, the Court feels it is entirely unfair to enforce it.

Very truly yours,

/s/ Marion J. Callister

cc: James Wickham
Deputy Attorney General

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 83-3839

DC# CV 80-4091 MJC

Idaho (Pocatello)

JEFF D., PAUL E., JOHN M. AND DUSTY R., minors, individually and on behalf of the class they represent, by and through their next friend, Charles Johnson, and Mark Clary, Intervenor,

Plaintiffs-Appellants,

vs.

JOHN V. EVANS, individually and in his official capacity as Governor of the State of Idaho, et al.,

Defendants-Appellees.

ORDER

(Filed September 26, 1983)

Before: FLETCHER and NELSON, Circuit Judges

Appellants' emergency motion for stay or injunction pending appeal is granted. The district court's order suspending the parties' stipulation pending appeal is vacated. Pending the disposition of this appeal, the parties shall comply with their Stipulation Settling Mental Health Claims.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Case No. 80-4091

JEFF D., PAULA E., JOHN M., and DUSTY R., MINOR, individually and on behalf of the class they represent, by and through their next friend, CHARLES JOHNSON,

Plaintiffs,

vs.

JOHN V. EVANS, MILTON G. KLEIN, JERRY EVANS, GEORGE BACHIK, and CARROLL ELMORE, individually and in their official capacities, their successors in office, title, and interests,

Defendants.

ORDER

(Filed October 22, 1984)

PURSUANT TO RULE 4(b), F.R.C.P., the period in which Defendants, John V. Evans, Rose Bowman (successor in office to Thomas L. Purce), George Bachik and William Gruzinski (successor in office to Carroll Elmore) shall respond to all matters which are now or may be pending in this Court shall be tolled until the latter of expiration of ninety (90) days after 1) entry of the mandate herein by the United States Court of Appeals; 2) denial of said Defendants' Petition for Writ of Certiorari in the Supreme Court; 3) remand of the matter to this Court after action by the Supreme Court; or 4) denial of said Defendants' Motion to Rescind Tender of Settlement, should they elect to so move.

DATED this 22 day of October, 1984.

Honorable Marion J. Callister
District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 83-3839

D.C. # CV 80-4091

MJC

(Dist[illegible] of Idaho)

JEFF D., PAUL E., JOHN M., and DUSTY R., minors individually and on behalf of the class they represent, by and through their next friend, Charles Johnson, and Mark Clark, Intervenor,

Plaintiffs-Appellants,

vs.

JOHN V. EVANS, individually and in his official capacity as Governor of the State of Idaho, et al.,

Defendants-Appellees.

O R D E R

(Filed November 6, 1984)

Before: SCHROEDER, FARRIS, and REINHARDT, Circuit Judges.

The Appellants' Second Emergency Motion for Stay for Injunction Pending Appeal is granted. The district court's order of October 22, 1984, is vacated. The parties shall comply with their Stipulation Settling Mental Health Claims.